No. 98-262-CFX Title: Bill Martin, Director, Michigan Department of Corrections, et al., Petitioners
v.
Everett Hadix, et al.

Docketed: —
August 11, 1998 Court: United States Court of Appeals for the Sixth Circuit

Entry	Date	Proceedings and Orders
	Aug 6 1998	Petition for writ of certiorari filed. (Response due September 10, 1998)
	Sep 4 1998	Waiver of right of respondents Everett Hadix, et al. to respond filed.
	Sep 9 1998	DISTRIBUTED. September 28, 1998
	Sep 16 1998	Response requested.
	Oct 16 1998	Brief of respondents Everett Hadix, et al. in opposition filed.
	Oct 28 1998	REDISTRIBUTED. November 13, 1998
	Nov 6 1998	Supplemental brief of petitioners Perry Johnson, et al. filed.
	Nov 16 1998	Petition GRANTED. limited to the following questions: 1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act, the attorney fee provision of PLRA Sec. 803(d), 42 U.S.C. Sec. 1997e(d), applies to fees awarded after the Act's effective date for services rendered after that date. 2. Whether, in such litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date. SET FOR ARGUMENT March 30, 1999. **********
	Dec 29 1998	Joint appendix filed.
	Dec 29 1998	Brief of petitioners Kenneth McGinnis, et al. filed.
	Dec 31 1998	Brief amici curiae of Ohio, et al. filed.
	Jan 29 1999	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jan 29 1999	Brief of respondents Everett Hadix, et al. filed.
	Feb 11 1999	CIRCULATED.
	Feb 12 1999	Record filed.
	Feb 23 1999	Record filed.
	Mar 17 1999	Supplemental brief of petitioners Bill Martin, et al. filed.
	Mar 30 1999	ARGUED.

No. _____

In the Supreme Court of the United States
October Term, 1998

PERRY JOHNSON, et al,

Petitioners,

v.

EVERETT HADIX, et al,

Respondents.

PERRY JOHNSON, et al,

Petitioners,

v.

MARY GLOVER, et al,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the attorney fee provision of the Prison Litigation Reform Act, PLRA § 803, 42 USC § 1997e(d), applies to fees for services in litigation pending on the effective date of the PLRA.

PARTIES TO THE PROCEEDING

Johnson v. Hadix:

Petitioners, Kenneth L. McGinnis is Director of the MDOC; Dan Bolden is Deputy Director for the Bureau of Correctional Facilities; Denise Quarles is the Regional Administrator; Thomas G. Phillips; Bruce Curtis; Henry Grayson; and Barry McLeMore are Wardens at the SPSM facilities; Travis Jones; Harold White; David Jamrod; and Carmen Palmer are Deputy Wardens at the SPSM facilities. David Laurin; Fred Parker; Marilyn Ruben; and Mike Rankin are Business Managers. Marjorie VanOchten is Administrator for Office of Policy and Hearings.[1]

Respondents, Everett Hadix; Richard Mapes; Patrick C. Sommerville; Roosevelt Hudson, Jr.; Brent E. Koster; Lee A. McDonald; Darryl Sturges; Robert Flemster; William Lovett; James Covington; James Haddix; and several John Does, are persons who are or were confined in Michigan Department of Corrections.

Johnson v. Glover:

Petitioners, Kenneth McGinnis is Director of the MDOC; Griffin Rivers is Director of MDOC's Bureau of Programs; Dan Bolden is Director of MDOC's Bureau of Correctional Facilities; Lloyd Kimbrell is Director of MDOC's Bureau of Prison Industries; Robert Steinman is Director of the MDOC's Bureau of Field Services; Joan Yukins is Warden of the Scott

[1] These petitioners are the successors in office to Perry Johnson, Robert Brown, Graham Allen, Dale Foltz, Elton Scott, Pam Withrow, Frank Elo, John Jabe, Charles Utess and John Prelesnik, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. A number of these positions have been expanded from one person to four people as the prison has been divided and each has been assigned its own staff hierarchy. Marjorie VanOchten's previous title was Hearings Administrator.

Correctional Facility; Sally Langley is Warden of the Florence Crane Correctional Facility.[2]

Respondents, Mary Glover; Lynda Gates; Jimmie Ann Brown; Manetta Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated are persons who are or were confined in the Michigan Department of Corrections.

[2] These petitioners are the successors in office of Perry Johnson, William Kime, Robert Brown, Jr., Frank Beetham, and Richard Nelson, respectively, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. Gloria Richardson, Dorothy Costen, and Clyde Graven, all listed as Defendants in the original action, are no longer Defendants due to the closure of certain facilities as women's prisons. Joan Yukins and Sally Langley were added as Defendants due to the opening of new facilities for women prisoners. Florence R. Crane, G. Robert Cotton, Thomas K. Eardley, Jr., B. James George, Jr., Duane L. Waters, and the Michigan Corrections Commission are no longer Defendants due to the dissolution of that Commission.

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Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 17, 1998.

OPINIONS BELOW

The April 17, 1998 opinion of the Court of Appeals is reported at 1998 U.S. App. LEXIS 7549 (6th Cir. April 17, 1998), and is reprinted in the Appendix to this Petition, App. 1a-26a. The prior opinions of the United States District Court for the Eastern District of Michigan, entered December 4, 1996, are not reported, and are reprinted in the Appendix to this Petition, App. 27a-41a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on April 17, 1998. On June 18, 1998, the Court of Appeals issued its Order denying Petitioners' Petition for Rehearing En Banc. App. 42a.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1, of the Constitution provides in relevant part that:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 802(b)(1) of the Prison Litigation Reform Act, 18 U.S.C. § 3626, provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with

respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

Section 803(d) of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), amending section 7 of the Civil Rights of Institutionalized Persons Act provides:

(d) ATTORNEY'S FEES.-(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that -

(A) the fee was directly and reasonably incurred in proving an actual violation of the Plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the Defendant. If the award of attorney fees is not greater than 150 percent of the Judgment, the excess shall be paid by the Defendant.

(3) No award of attorney fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the

hourly rate established under section 3055A of Title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the Defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

STATEMENT OF THE CASE

This matter concerns attorney fees in prison reform litigation which has been pending before the district court for over twenty (20) years.

Glover involves a 21-year old controversy between incarcerated female felons and the Michigan Department of Corrections (hereafter MDOC). In 1977, Respondents, a class consisting of all female inmates incarcerated by the MDOC, filed a civil rights action pursuant to 42 U.S.C. § 1983 alleging that Petitioners, various officials of the MDOC, violated the Equal Protection Clause of the United States Constitution with regard to programming and access to the courts.

Hadix concerns a 13-year old Consent Decree (18 years of litigation) involving a class of male prisoners incarcerated at the State Prison of Southern Michigan, Central Complex, who pursuant to 42 U.S.C. § 1983 alleged violations of the First, Eighth, Ninth and Fourteenth Amendments to the Constitution.

In 1985 in *Glover*, and 1987 in *Hadix*, the district court entered orders which awarded fees and costs to Respondents' attorneys for compliance monitoring. Pursuant to procedures established by the district court in each case, a system was created which provided for Respondents' submission of fees and costs on a semi-annual basis and for the lodging of Petitioners' objections. In the absence of agreement, the district court resolves the fee dispute.

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), (PLRA), was signed into law by President Clinton and took effect on April 26, 1996.[3] The PLRA was intended to curtail the overly intrusive involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees such as those involved in

[3] The PLRA is found in Title VIII of the omnibus appropriation bill for the fiscal year 1996 for the Departments of Commerce, Justice and State, the Judiciary and Related Agencies.

Glover and *Hadix*.[4] A second purpose of the PLRA was to stem the tide of frivolous prisoner suits.[5] Section 803(d) of the PLRA includes the provision governing the award of attorney fees in prisoner civil rights litigation. It provides in relevant part:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that --
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d)(3). In the United States District Court for the Eastern District of Michigan, $75.00 per hour is the maximum amount a court-appointed attorney may be reimbursed pursuant to 18 U.S.C. § 3006A(d)(1). The

[4] *See, e.g.*, 141 Cong. Rec. S14315 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) ("The legislation I am introducing today [S. 1275] will return sanity and State control to our prison systems by limiting judicial remedies in prison cases [such as those in the State of Michigan] . . . ."); 141 Cong. Rec S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) ("these guidelines will work to restrain liberal federal judges who see violations on [sic] constitutional rights in every prisoner complaint who have used these complaints to micromanage state and local prisons.").

[5] *See, e.g.*, 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) (in addition to problems with "massive judicial interventions in state prison systems, we also have [the problem of] frivolous inmate litigation); 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) (legislation introduced, S. 1279, will address the "alarming number of frivolous lawsuits" filed by prisoners).

established rate of pay for Respondents' attorneys in both cases has been $150.00 per hour since at least 1993. The PLRA cap on attorney fees would reduce this amount to $112.50 per hour.

After the enactment of the PLRA, each class of Respondents in *Glover* and *Hadix* filed a petition for services performed from January 1, 1996 through June 30, 1996 pursuant to established procedure. Petitioners argued that the attorney fee limitation of the PLRA should be applied to the fee petitions. In nearly identical opinions, the district court held the fee provision inapplicable to fees earned for services performed before enactment of the PLRA but applied it to those earned for services performed thereafter. (App., pp 27a-41a).

On April 17, 1998, the Court of Appeals issued its Opinion affirming the District Court's decision that held the fee provision inapplicable to fees earned before the enactment of the PLRA and reversing the District Court's decision applying the PLRA to fees earned after the Act's enactment. (App., pp 1a-26a). Subsequently, on June 18, 1998, the Sixth Circuit issued its Order denying Petitioners' Petition for Rehearing En Banc.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's Opinion conflicts with the other circuits that have reviewed this issue. The Fourth, Eighth and Ninth Circuit Courts of Appeal have held that the PLRA's attorney fee provisions apply to legal fees earned in actions pending on the date of enactment. *Alexander S. v Boyd*, 113 F.3d 1373 (4th Cir. 1997) *cert den* 139 L.Ed.2d 869 (1998); *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997); *Madrid v. Gomez*, _ F.3d _; 1998 U.S. App. Lexis 14857 (9th Cir. July 2, 1998).

In addition, the Court of Appeals has misapprehended decisions of this Court and the intent of Congress on an important federal question being litigated throughout the country. The PLRA is comprised of ten sections; the attorney fee provisions are contained in § 803 which is codified at 42 U.S.C. § 1997e(d). The Court of Appeals failed to give effect

to the plain language of § 803 which is applicable to all litigation brought by prisoners, no matter when begun. Only § 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions. The Court of Appeals erred by concluding that Congress's inclusion of a provision applying a different part of the Act (section 802) to pending cases, combined with the absence of any provision prescribing the fee provisions' reach, implies that Congress intended the fee provisions to apply only to cases filed after the Act's passage.

In the absence of conclusive evidence of congressional intent the inquiry turns to whether the provision, if retrospectively applied, would have an impermissible retroactive effect. In the instant case, applying the fee provisions of the PLRA to attorney hours worked after the PLRA's passage would have no retroactive effect. All the disputed compensable legal work at issue was performed after the enactment of the PLRA and, so, should be governed by the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place", *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J. concurring). Under that principle, the conduct -- the work performed by the lawyers -- should be assessed under the law -- the PLRA -- in effect at the time the fees were earned.

Unless this Court grants certiorari and reverses the erroneous decision of the Court of Appeals, Michigan taxpayers will be required to pay hundreds of thousands of dollars in attorney fees under the PLRA, 42 U.S.C. § 1997e(d), contrary to the clear prohibition of the act.

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL CONCERNING THE APPLICATION OF PLRA § 803 TO ATTORNEY FEES EARNED FOR SERVICES PERFORMED IN LITIGATION PENDING ON THE DATE OF ITS ENACTMENT.

Four circuit courts of appeal have addressed the issue of whether the PLRA applies to attorney fees payable for services performed after enactment of the PLRA. The Fourth, Eighth and Ninth Circuit Courts of Appeals have held that the PLRA's attorney fee provisions apply to legal fees earned in actions pending on the date of enactment. The Sixth Circuit alone has held to the contrary. This Court has repeatedly held that certiorari review is appropriate where there is a conflict between the general principles or reasoning adopted in the several courts of appeals. Supreme Court Rule 10(a); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985); *Oregon Dep't of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985); *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975).

In *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997), the Court held that § 803(d) applies to all hours worked in prisoner litigation after the effective date of the PLRA. The Court distinguished its earlier decision in *Jensen v. Clark*, 94 F.3d 1191 (8th Cir. 1996), by noting that the legal work there had been performed (and the award issued) before the PLRA had taken effect. *Id.* at 1094.

In *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997) *cert den* 139 L.Ed.2d 869 (1998), the Court took a broader view, reading what it called the "plain language" of § 803(d) as mandating that attorney fees awarded after April 26, 1996, comply with its restrictions regardless of when the work was performed. *Id.* at 1386. While Congress could have used limiting language, it had not done so; accordingly the "*plain language* of § 803(d) of the PLRA . . . mandates that the attorney fee limitations apply to awards [made after the Act]." *Id.* (emphasis added). The concurring judge agreed

that the "plain language of the statute directs that it applies when a court makes its *award* . . . ." *Id.* at 1392 (emphasis in original). In *Alexander S.*, the Court also focused on the "secondary" nature of attorney fees and held the PLRA's attorney fees provisions did not disrupt any matured rights of the parties. *Id.* at 1387-88. The Court determined "a statute has a retroactive effect under *Landgraf* only when it negatively impacts a party's expectations or rights." *Id.* at 1387 n. 12. The PLRA fee provisions only "upset the expectations of Plaintiff's counsel," but that was not enough to create an impermissible retroactive effect. *Id.* The Court further determined the PLRA fee provision did not "attach new legal consequences to completed events," nor were the provisions "so fundamentally unfair as to result in manifest injustice." *Id.* at 1388.[6]

In *Madrid v. Gomez*, __ F.3d __; 1998 U.S. App. Lexis 14857 (9th Cir. July 2, 1998), the Court held that the attorney fee limitations provisions of the PLRA apply to cases which were pending at the time of the Act's enactment. The Court held that the clear language of section 803 compels application of the attorney fee provisions to such cases. *Id.* at *7-17. The Court also noted that, even were this "express command omitted from the statute", the PLRA does not have a "retroactive effect" if applied to cases pending at its enactment. *Id.* at *17-18.

In the instant case, *Hadix v. Johnson*, Nos. 96-2567; 2568; 2586; 2588, 1998 U.S. App. LEXIS 7549 (6th Cir. April 17, 1998), the Sixth Circuit nevertheless held that § 803(d) is "retroactive" if applied in litigation commenced before the PLRA was enacted, no matter how much later the lawyers do their work. The Court of Appeals has expanded the concept of "retroactivity" beyond recognition, but even if its premise is correct, the conclusion that § 803(d) should never be applied to litigation pending when the PLRA took effect is wrong.

Because of the inconsistencies described above and

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6 The Court also held the PLRA provisions had to be applied to all legal work in pending cases performed prior to the date of enactment where the award of attorney fees is made after April 26, 1996. *Id.* at 1377.

because of the national importance of the effects of the attorneys fee provisions of the PLRA on prisoner litigation, this Court should grant certiorari in this case.

II.

THE PRISON LITIGATION REFORM ACT APPLIES TO ATTORNEY FEES EARNED FOR SERVICES PERFORMED IN LITIGATION PENDING ON THE DATE OF ITS ENACTMENT.

A. The Plain Language of PLRA § 803 Makes It Applicable to All Litigation Brought by Prisoners, No Matter When Begun.

The plain language of PLRA § 803(d), 42 U.S.C. § 1997e(d) makes it applicable to all litigation brought by prisoners, no matter when begun. The attorney fee provisions unmistakably apply to "any action brought by a prisoner who is confined to any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(d)(1). In any action, attorney fees "shall not be awarded" unless directly and measurably incurred in proving an actual violation; in any action, "no award of attorney fees" shall exceed the prescribed hourly rate. 42 U.S.C. § 1997e(d)(1), (3). Thus, regardless of when the case was filed, section 803 applies; the statute by its terms, targets any post-enactment award. The text is simply not susceptible to another meaning. *See, Madrid v. Gomez*, __ F.3d __; 1998 U.S. App. Lexis 14857, *9 (9th Cir. July 2, 1998). The "in an action brought by a prisoner" language uses no words of temporal restriction, plain or obscure. Rather, the language is descriptive of the type of litigation to be affected: "any action brought by a prisoner." On its face, it is also comprehensive, embracing *all* such actions, irrespective of when they were filed.

The only way to foster an alternative meaning would be to add language to what Congress has written. The attorney fee provisions operate in "any action," not in "any action filed after the effective date." *Id.* A court should not alter a statute's effect by reading into the text words which Congress chose to omit. Nor should a court disregard the plain meaning

of the word "any." In its conventional usage, "any" means "ALL - used to indicate a maximum or whole." *Webster's Ninth Collegiate Dictionary*, 93 (1st ed. 1986).

"By expressly stating that [§ 803] applies to an 'award' of fees Congress clearly evidenced its intent to affect a fee 'award' regardless of when legal work was completed." *Alexander S. v. Boyd*, 113 F.3d 1373, 1393 (1997), *cert. den.* 139 L. Ed. 2d 869 (1998) (Motz, J. concurring). Even the Court of Appeals recognized that the applicability of the statute cannot turn on the timing of the work. *See* App., p 11a. ("We do not believe the statutory language is capable of such a sophisticated construction.") Moreover, § 803 emphatically states: "*No* award of attorney's fees . . . shall be based on an hourly rate greater than [$112.50]." 42 U.S.C. § 1997e(d)(3) (emphasis added). There can be only one interpretation of this word: "No" means "no." *See, Madrid* at *10-11.

In *Lindh v. Murphy*, 521 U.S. ___; 117 S. Ct. 2059; 138 L. Ed. 2d 481 (1997), this Court acknowledged the force of categorical language such as "all" and "any." *Lindh*, 117 S. Ct. at 2064, n. 4. Stressing the word "all" -- and noting its "absolute" nature -- this Court quoted the unenacted precursor to the statute addressed in *Landgraf* as an example of language that might qualify as a clear statement: "[This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act." *Id.* This Court also cited by way of analogy, the unequivocal waiver of sovereign immunity at issue in *United States v. Williams*, 514 U.S. 527, 531-32 (1995), and emphasized the absolute nature of the word "any" used in granting jurisdiction to the courts over "'*any* civil action against the United States for the recovery of *any* internal-revenue tax alleged to have been *erroneously* or illegally assessed or *collected*'." *Lindh*, 117 S. Ct. at 2064, n.4 (emphasis in *Williams*, underlined emphasis added). Section 803 also uses the word "any."

As recently noted by the Ninth Circuit Court of Appeals in determining that the attorney fee limitations provisions of the PLRA apply to cases which are pending at the time of its enactment:

> We acknowledge that Congress could have been

even more precise than it was. For example, it could have added a sentence at the end of § 803 reciting that the attorney's fee provisions "apply both to cases pending on and to cases commenced after the enactment date." However, the Supreme Court has never required the most emphatic possible articulation of a statement, only an unambiguous directive. Indeed, in Landgraf, as Justice Scalia noted with dismay, the Court was even willing to look to legislative history to find a clear statement. See *Landgraf, 511 U.S. at 287* (Scalia, J., concurring)(citing *Landgraf, 511 U.S. at 257-63)*; see also *Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184, 1 L. Ed. 2d 746, 77 S. Ct. 707 (1957)* ("It is clear from the language of the section and its legislative history that Congress thereby confirmed the authority of the Commissioner to correct any ruling, regulation, or Treasury decision retroactively . . . .")(emphasis added). We therefore conclude that Congress's use of the word "any" unambiguously indicates that the PLRA's attorney's fee provisions apply to all actions, irrespective of when they were filed.

Madrid at *12-13 (footnotes omitted).

B. Comparison of PLRA § 802 with PLRA § 803 Does Not Permit the Negative Inference That Congress Intended § 803 to Apply Only to Cases Filed After the Enactment of the PLRA.

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court prescribed the analysis a court should use to determine whether a federal statute should be applied retrospectively. First, if there is evidence of congressional intent, then that intent is followed. *Id.* at 264, 280; see also *Lindh v. Murphy*, 521 U.S. __; 117 S. Ct. 2059; 138 L. Ed. 2d 481 (1997) (seeking to determine, in first step of *Landgraf* analysis, what "a thoughtful member of the Congress was most likely to have intended"). Where there is no conclusive evidence of congressional intent, the inquiry turns to whether the provision, if retrospectively applied, would have an

impermissible "retroactive effect." *Landgraf* at 280. If it has such an effect, then the general presumption against retrospective application applies, and the statute is applied only prospectively. *Id.* Conversely, if the statute has no retroactive effect, then the general presumption falls away, and a court should "apply the law in effect at the time it renders its decision." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) (quoted in *Landgraf*, 511 U.S. at 264).

Despite the statutory language applying § 803 to "any" action, both the text of the PLRA and the Act's legislative history are silent on the specific question of whether the fee provisions apply to cases pending on the date of the Act's passage. Under *Landgraf*, this ends the first step of the analysis. Despite this silence, the Court of Appeals improperly concluded that Congress's intent not to apply the fee provisions is plain from the language of the PLRA. The PLRA is comprised of ten sections; the attorney fee provisions, codified at 42 U.S.C. § 1997e(d), are contained in section 803. Only section 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions.[7] According to the Court of Appeals' Opinion, the fact that Congress expressly applied section 802 to pending cases and did not expressly do so in the attorney fee provisions of section 803 leads to the inference that Congress intended the fee provisions to apply only to cases filed after the Act's passage. Petitioners contend the Court of Appeals reads too much into Congress's silence, however.

Contrary to the Court of Appeals' decision, Congress's prescription of the temporal reach of section 802 of the PLRA has no implications for the Act's attorney fee provisions. Where, as here, two provisions have distinctly different effects, the presence of an express temporal limit in one has little bearing on the absence of an express limit in the other. *See Lindh v. Murphy, supra*. In *Lindh*, this Court was presented

[7] Section 802(b)(1) of the PLRA provides: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."

with the question whether the Antiterrorism and Effective Death Penalty Act's (AEDPA) amendments to chapter 153 of Title 28 applied to cases pending at enactment. As here, Congress was silent as to the amendments' temporal reach. However, Congress explicitly provided that the AEDPA's amendments to chapter 154 of Title 28 "shall apply to cases pending on or after the date of enactment of the Act." Pub. L. No. 104-132, § 107(c), 110 Stat. 1214 (Apr. 24 1996).

In determining what implications to draw from Congress's different treatment of the two sets of amendments, this Court compared the effects of the two provisions. The amendments to chapter 153 created new standards for the review of habeas corpus petitions filed by state prisoners; likewise, the amendments to chapter 154 created new standards for the review of habeas corpus petitions filed by state prisoners under capital sentences. *Lindh*, 117 S. Ct. at 2063-64. The fact that both provisions "govern standards affecting entitlement to relief" was "significant" to this Court. *Id.* at 2064. In part because of this similarity, this Court concluded that Congress's silence with regard to the temporal reach of the chapter 153 amendments could be read as signaling its intent that the amendments not be applied to pending cases. *Id.* at 2064-65.

Both AEDPA chapters considered in *Lindh* established the standard for review for habeas corpus petitions filed by state prisoners. No such similarity exists between sections 802 and 803 of the PLRA. Section 802 of the PLRA creates new standards for awards of prospective relief in litigation over prison conditions. It prohibits the award of prospective relief unless the relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." Section 802(a), 18 U.S.C. § 3626(a)(1). Moreover, it provides for "immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court" that the new conditions just described were met. Section 802(a), 18 U.S.C. § 3626(B)(2) ("immediate termination provision"). At the time of the Act's passage, numerous awards of prospective relief already existed, over which many federal judges across the country retained continuing jurisdiction. In light of those existing

orders, it is unsurprising that Congress took an affirmative step to make its intentions -- that the new substantive provisions would in fact apply to those orders -- absolutely clear. *See, e.g., Salahuddin v. Mead*, 1997 U.S. Dist. LEXIS 8895 (S.D.N.Y. June 26, 1997) ("a plain reading of section 802 shows that Congress inserted such specific retroactive language in order to emphasize the unusually far-reaching consequences of this retroactivity provision.")

By contrast, the provisions at issue here -- located in section 803 of the Act -- merely govern the award of attorney fees. The provisions have no effect on judgments or awards already entered. These provisions thus have nothing in common with section 802 of the Act. Congress's decision to affirmatively prescribe the temporal reach of section 802, therefore, has no bearing on Congress's silence on the reach of the fees provisions. *See Id.* The failure of Congress to include language in section 803 specifically dealing with pending cases is not a case where "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n. 23 (1991); see also *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1989) (Rehnquist, J., dissenting).

The Court of Appeals reviewed a part of the legislative history, and conceded that the negative inference to be drawn from the Senate's decision to include the attorneys' fees provision in § 803 rather than in § 802 "is weaker than the inference drawn in *Lindh*." (App., p 16a). Despite this concession, the Court said: "Nonetheless, the identical negative inference that was drawn in *Lindh* can be drawn when sections 802 and 803 are compared." *Id.* Section 802, the Court wrote, was addressed to restrain perceived judicial excesses in prison litigation, past and future. By contrast, § 803 is "forward looking," "aimed at the filing of frivolous lawsuits." (App., p 16a).

The Court of Appeals' analysis is flawed for a number of reasons. First, *Lindh* found a negative inference to be justified only when two parts of a statute are so closely related that the strong implication is that, in choosing different language, Congress drew a "deliberate * * * contrast" between them. *Lindh*, 117 S. Ct. at 2065. Where statutory provisions are less closely related, the negative pregnant inference is far weaker,

especially when other textual pointers suggest a different result. *See Field v. Mans*, 516 U.S. 59, 67-68, 75 (1995). In *Lindh*, chapters 153 and 154 were complementary halves of the entire habeas corpus portion of Title 28. Similarly, *Field* compared two paragraphs of a Bankruptcy Code subsection. By contrast, sections 802 and 803 amend disparate laws in Titles 18 and 42.

More importantly, the subject-matters of sections 802 and 803 are wholly distinct. Section 802 sets substantive limits on prison reform litigation. Under *Landgraf*, an express direction by Congress was necessary to limit previously issued injunctions.[8] Without the language in section 802, courts would be under no obligation to amend those injunctions or bring them to an end. *Collins v. Algarin*, 1998 U.S. Dist. LEXIS 83 at *10-*11 (E.D. Pa. 1998); *Salahuddin v. Mead*, 1997 U.S. Dist. Lexis 8895 at *10 (S.D. N.Y. 1997)(language was used "to emphasize the unusually far-reaching consequences of this retroactivity provision"). The absence of similar language in section 803 of the PLRA is easily explained because there is no similarly compelling reason to specify that the law will apply to conduct -- such as work to be done by lawyers in the future --which would occur only after the Act's effective date. *Collins*, at *11.

Second, *Lindh* found it critical -- even dispositive -- that chapters 153 and 154 both fell on the substantive side of the *Landgraf* default rule. *Lindh*, 117 S. Ct. at 2063-2064. That permitted this Court to conclude that Congress, legislating with presumed knowledge of *Landgraf's* "predictable background rule" (*Landgraf*, 511 U.S. at 273), had deliberately chosen to treat chapters 153 and 154 disparately. The *Lindh* analysis yields an entirely different result here. Section 802, designed to reopen existing injunctions, reaches the merits of the litigation and is plainly substantive. By contrast, section 803(d) in the present context, deals only with attorney fees and is considered procedural and collateral. *Landgraf*, 511 U.S. at 277. In light of Congress's presumed familiarity with

[8] *See, e.g.*, 18 U.S.C. § 3626(b)(2), as amended by PLRA § 802(a), which permits the immediate termination of prospective relief if the relief had been approved or granted without a finding now required by the PLRA.

Landgraf, *Lindh* compels the conclusion that Congress intended both sections to apply to pending litigation despite differences in language. Under *Landgraf* and *Lindh*, section 802 is retroactive only because Congress explicitly said so; section 803(d) is "retroactive" because Congress knew it to be procedural.

Third, the Court of Appeals misunderstood the purpose of the PLRA's attorney fee provisions and therefore mistakenly assumed that they could only be "forward looking." (App., p 16a). The purpose of the fee provisions was plainly *not* to curtail frivolous lawsuits, as the Sixth Circuit supposed. Fees are never awarded unless the plaintiff is the prevailing party. By definition, if the plaintiff is entitled to fees, it is because the litigation was *not* frivolous. The more likely explanation for § 1997e(d) is that Congress wanted to protect states and local government treasuries from the enormous costs of *successful* litigation. Without restrictions, fee-shifting substantially increases the financial burden of prison litigation, sometimes exceeding the other costs of court-ordered relief. That is especially so when monitoring by counsel extends over decades, as in these cases. The authors of the PLRA expressed great concern about the cost of prison litigation to state and local governments. When introducing S. 1279, Senator Dole expressed dismay that prison litigation cost the states $81 million annually. 141 CONG. REC. S14413 (daily ed., Sept. 27, 1995). Senator Hatch, noting that 45% of all federal civil cases in Arizona in 1994 had been filed by prisoners, declared that "it is time to wrest control of our prisons from the lawyers and the inmates * * *." *Id.* at 14418. In the House, the committee report noted that costs to state and local governments would be reduced by a more proportional system for awarding fees and by eliminating financial incentives to litigate such ancillary matters as, notably, fee petitions. H.R. Rept. 104-21, "Violent Criminal Incarceration Act of 1995" at 28 (Feb. 6, 1995). Congress's concern about this financial hemorrhaging is not inherently "forward looking," as the lower court falsely assumed. Congress was fully aware that prison litigation often had untold longevity. *See Hadix v. Johnson*, 65 F.3d 532, 535 (6th Cir. 1995) (monitoring of prison-reform decree "resembles a cash cow"). It is far more likely, therefore, that Congress intended the attorney fee provisions to apply to pending

litigation, especially for work performed after the PLRA's effective date, in order to give states and local governments immediate relief from the future long-term, expenses of existing litigation.

Petitioners submit that the Court of Appeals erred in drawing any negative inferences from the express inclusion of a provision making section 802 applicable to pending cases and the absence of the same from section 803. *Landgraf*, 511 U.S. at 259-61 (rejecting argument that "because Congress provided specifically for prospectivity in two places . . . we should infer that it intended the opposite for the remainder of the statute").

C. Applying the Attorney Fee Provisions to Work Performed in Pending Litigation After the PLRA's Enactment Will Have No Retroactive Effect.

A new statute would have a retroactive effect if, when applied to pending cases, it would impose new burdens on a party who relied on the prior legislative scheme. *Landgraf*, 511 U.S. at 265 (the presumption against retroactive legislation is grounded in "[e]lementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and *to conform their conduct accordingly*.") (emphasis added); *see also Id.* at 270 ("familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining whether a statute would have a retroactive effect). Thus, a statute would have a retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. Here, applying the attorney fee provisions only to legal work performed after the PLRA's passage would have no retroactive effect.

There is an impermissible retroactive effect if application of the statute to a pending action amounts to an "injustice." *Bradley*, 416 U.S. at 717; see *Lindh*, 117 S. Ct. at 2063 (intervening statute changed "standards of proof and persuasion in a way favorable to [the] state"). If the new

statute causes a "change in the substantive obligation of the parties," application of the statute may be impermissible. *Bradley*, 416 U.S. at 721. New statutes cannot be applied to pending actions if they would "infringe upon or deprive a person of a right that had matured or become unconditional." *Id.* at 270.

A statute is retroactive only when it "attaches new legal consequences to *events completed before its enactment*." *Landgraf*, 511 U.S. at 269 (emphasis added). *Landgraf's* definition of retroactivity echoes the precedent this Court cited there, *Id.* at 269, n. 23; *Miller v. Florida*, 482 U.S. 423, 430 (1987)("changes the legal consequences of acts *completed before its effective date*")(internal quotations omitted; emphasis added); *Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)("gives quality or effect to acts or conduct which they did not have or did not contemplate *when they were performed*")(emphasis added). *Landgraf* itself deals with a typical retroactivity problem, that of increasing a defendant's costs for pre-act conduct by creating rights to compensatory and punitive damages. Punitive damages come close to criminalizing past conduct and compensatory damages are so "quintessentially backward-looking" that they constitute a new cause of action. *Landgraf*, 511 U.S. at 281, 283. *See*, similarly, *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 303 (1994)(statute enlarging categories of conduct subject to liability will not be applied to events occurring before enactment); *Hughes Aircraft Co. v. United States ex rel. Schumer*, __ U.S. __, 117 S. Ct. 1871, 138 L. Ed. 2d 135 (1997)(statute eliminating a defense to *qui tam* suits will not be applied to past fraudulent actions).

The bias against retroactive legislation arises precisely because of its impact on completed conduct, conduct that can no longer be altered. "Retroactivity" is disfavored because a new law "would impair rights a party possessed *when he acted*, increase a party's liability *for past conduct*, or impose new duties with respect to *transactions already completed*." *Id.* at 280; emphasis added. There is an obvious "unfairness [in] imposing new burdens on persons after the fact." *Landgraf*, 511 U.S. at 270; *Id.* at 282 n. 35 (noting that unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past). Fairness dictates that

people "should have an opportunity to know what the law is and to conform their conduct accordingly" before they act. *Id.* at 265.

There is no corresponding unfairness, of course, when legislation regulates future conduct -- conduct that takes place *after* the legislation is in place: "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central RR Co. v. White*, 243 U.S. 188, 198 (1917); *see Landgraf*, 511 at 269, n. 24, quoting L. Fuller, THE MORALITY OF LAW 60 (1964)("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever").

Under *Landgraf*, application of the PLRA to services performed after enactment would not be retroactive, even in cases filed prior to the enactment date. To the contrary, this Court in *Landgraf* relied in part on its prior holding in *Bradley*, in which a new attorney fee provision was applied despite the fact that the provision was enacted while the case was on appeal. In explaining the *Bradley* decision, this Court in *Landgraf* suggested that the traditional presumption against retroactive application of new statutes might apply differently when the new provisions regulate attorney fees, because "[a]ttorney fees determinations . . . are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." 511 U.S. at 277 (quoting *White v. New Hampshire Dept of Employment Security*, 455 U.S. 445, 451-52 (1982)).

When an intervening statute affects prospective relief, it is neither retroactive nor unfair. *See Landgraf*, 511 U.S. at 273. Moreover, several post-*Bradley* decisions have determined that applying new statutory provisions regarding attorney fee provisions to pending civil actions does not "impose an additional or unforeseeable obligation" upon the parties. *Landgraf*, 511 U.S. at 278; *see, e.g., Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917, 922-23 (2nd Cir. 1992) (finding no retroactivity issue to exist where fees were awarded only for the period subsequent to passage of a new amendment); *Simmons v. Lockhart*, 931 F.2d 1226, 1229-1231 (8th Cir. 1991) (awarding fees under old scheme for work

performed before passage of new provision, and under new scheme for work performed after enactment); *Alexander S. v. Boyd*, 113 F.3d 1373, 1387-1388 (4th Cir. 1997) *cert den* 139 L. Ed. 2d 869 (1998).

The conduct affected by § 1997e(d) in the present cases is not conduct completed before the PLRA took effect. It is without question that after April 26, 1996 Respondents' attorneys had notice of the PLRA and its potential effect on any attorney fees award to which they might be entitled. Applying the PLRA fee provisions to Respondents will not "impair rights possessed when [they] acted, increase liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Limiting prisoners' attorney fees to 150 percent of the amount allowed for court-appointed counsel is not "so fundamentally unfair as to result in manifest injustice." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (instructing that section 1988 was "never intended to produce windfalls to attorneys"); see also, *Id.* at 122 (stating that section 1988 "is not a relief Act for lawyers"). Since Petitioners do not dispute Respondents' counsel's entitlement to be paid for pre-PLRA work under pre-PLRA standards, § 1997e(d) creates no new consequences for historic events, past conduct, or transactions already completed.

If the Court of Appeals' opinion is not corrected by this Court, Plaintiffs' counsel in every prison case pending in Michigan, Ohio, Kentucky and Tennessee on the date of enactment of the PLRA will essentially be "grandfathered" and entitled to the older, higher rates for as long as the case (including, as here, monitoring of the implementation of a remedial decree) might last. Such a reading is not a reasonable construction of a statute that was intended in part to lower the costs to states of prison litigation.[9]

Moreover, a lawyer's decision to represent a client and file a case cannot reasonably be based upon the assumption that

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[9] *See, e.g.*, 141 Cong. Rec. S 14312, S 14316 (daily ed. September 26, 1995) (statement of Sen. Abraham) (one goal of PLRA is to reduce litigation which "raises the cost of running prisons far beyond what is necessary").

he or she will be entitled to the same rates of compensation for the life of the case. Indeed, given that fees are only shifted if the plaintiff wins, that fee awards generally take into account changes in market rates over time, and that courts routinely apply the statutory law in effect at the time of decision to attorney fees, *Landgraf*, 511 U.S. at 264 (citing *Bradley*, 416 U.S. at 711), a lawyer's expectation is precisely the opposite. Thus, the "rights a [lawyer] possessed when he acted" are not those at the time of taking a case and filing a complaint, but rather those at the time legal work has been performed with an expectation of being paid at current rates. The "familiar considerations of fair notice, reasonable reliance, and settled expectations" confirm that application of the PLRA here is not inappropriately retroactive; lawyers who continued to perform work after passage of the PLRA can be assumed to have done so with the expectation that they would receive less compensation.

The application of the PLRA's attorney fee limitations to work performed after April 26, 1996 does not have an impermissible retroactive effect because the determination of attorney fee awards, which are collateral to the main cause of action, does not attach new legal consequences to completed events. Moreover, the modifications made by section 803 of the PLRA to Respondents' entitlement to attorney fees are not so fundamentally unfair as to result in manifest injustice.

CONCLUSION

For all these reasons, Petitioners respectfully urge this Court to grant Certiorari and reverse the Court of Appeals.

Respectfully submitted,

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August, 1998

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RECOMMENDED FOR FULL TEXT PUBLICATION
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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Everett Hadix, et al. (96-2567/2568); Mary Glover, et al. (96-2586/2588; 97-1218/1272),
Plaintiffs-Appellees/ Cross-Appellants,

Nos. 96-2567/ 2568/2586/2588; 97-1218/1272

v.

Perry M. Johnson, Director, et al.,
Defendants-Appellants/ Cross-Appellees.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
Nos. 77-71229; 80-73581--John Feikens, District Judge.

Argued: December 11, 1997

Decided and Filed: April 17, 1998

Before: KENNEDY, JONES, and SUHRHEINRICH, Circuit Judges.

COUNSEL

ARGUED: Leo H. Friedman, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, Jeffrey D. Dillman, Ann Arbor, Michigan, for Appellees. **ON BRIEF:** Leo H. Friedman, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, Michael Barnhart, Detroit, Michigan, for Appellees.

KENNEDY, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. JONES, J. (p. 29), delivered a separate concurring opinion.

OPINION

KENNEDY, Circuit Judge. These four appeals primarily concern attorney fees in the Michigan prison reform litigation which has been the subject of numerous appeals to our Court for decision. We have consolidated the appeals for decision. One of these appeals, No. 97-1218, is moot because the order challenged in that case has expired by its terms. The three other appeals present overlapping issues surrounding the propriety of three awards of attorney fees for work performed primarily during the period of January 1, 1996 through June 30, 1996.

The major issue before us is whether the attorney fee limitation of section 803(d) of the Prison Litigation Reform Act ("PLRA" or the "Act"), 42 U.S.C. § 1997e(d) applies to work performed after the PLRA's enactment date of April 26, 1996 in a case filed before the enactment date. Section 803(d), among other things, places a cap on the hourly rate attorneys may be awarded under 42 U.S.C. § 1988 in civil rights

litigation brought by prisoners. 42 U.S.C. § 1997e(d)(3). Recently, in a separate *Glover* appeal, we held that section 1997e(d) does not apply to work performed prior to the PLRA's enactment. *Glover v. Johnson*, ___ F.3d ___ (6th Cir. 1998). For reasons fully explained below, we conclude that section 1997e(d) is likewise inapplicable to post-enactment work. Neither the language of the statute nor the legislative history permits us to conclude that Congress intended to differentiate between pre-enactment and post-enactment services.

In *Glover*, defendants also argue for reversal of the fee awards because plaintiffs were not prevailing parties within the meaning of 42 U.S.C. § 1988 in three appellate matters. As explained below, we uphold the awards as to two of the three matters and reverse as to the third because the work was not compensable compliance monitoring and plaintiffs did not prevail on appeal or on their petition for certiorari. On cross-appeal, the *Glover* plaintiffs argue that the District Court abused its discretion in declining to increase the hourly rate of a paralegal from the rate last approved by the court. We shall reject this contention as without merit.

I. OVERVIEW OF THE LITIGATION

A. *Glover v. Johnson*

In 1977, a now-certified class of female inmates incarcerated in the Michigan prison system, filed an action pursuant to 42 U.S.C. § 1983 in which they alleged violations of certain constitutional rights surrounding the conditions of their confinement. The District Court found that the Glover plaintiffs had been denied the same vocational and educational opportunities provided to male inmates, in violation of the Equal Protection Clause of the Fourteenth Amendment, and that the female inmates had been unconstitutionally denied meaningful access to the courts. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979) (*"Glover I"*). After extensive negotiations, the District Court entered an order specifying remedial actions to be undertaken by the defendants to remedy the constitutional violations found and retained jurisdiction until substantial compliance with the remedial order is achieved. *Glover v. Johnson*, 510 F.

Supp. 1019 (E.D. Mich. 1981) (*"Glover II"*). Neither of these orders were appealed by defendants.

On November 12, 1985, the parties stipulated to an order of the District Court, which awarded plaintiffs attorney fees, including fees for monitoring defendants' compliance with the District Court's orders, and established a system providing for plaintiffs' submission of fees and costs on a semi-annual basis and for the lodging of defendants' objections thereto. This 1985 Order, which plaintiffs contend establishes their entitlement to monitoring fees, has never been appealed. It provides in relevant part:

> IT IS HEREBY ORDERED that Plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months. Defendants will have twenty-eight days in which to contest the amount of the fee request.

Thus, since 1985, the parties have followed this procedure and plaintiffs' attorneys have been paid attorney fees at the prevailing market rate, which has increased over the years, to the current rate of $150.00 per hour. In a Memorandum Opinion and Order dated November 27, 1989 (the "1989 Order"), the District Court interpreted its 1985 Order as authorizing attorney fees for monitoring compliance with the court's orders in this case in addition to non-monitoring legal work, and as having decided the prevailing party issue. It also held that the prevailing party issue will not be re-decided with each petition for fees, and that the court is therefore not required to await the completion of an appeal before determining whether plaintiffs are prevailing parties on otherwise compensable work. Defendants appealed the 1989 Order, and this Court affirmed the District Court's holdings. *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1989) (*"Glover III"*).

B. *Hadix v. Johnson*

In 1980, a class of male prisoners incarcerated in the State Prison of Southern Michigan, Central Complex ("SPSM-CC"), brought a class action pursuant to 42 U.S.C. § 1983 alleging violations of their rights under the First, Eighth, Ninth and Fourteenth Amendments to the Constitution. The parties

entered into a comprehensive consent decree, which was approved by and made an order of the District Court on April 4, 1985. The detailed 33-page consent decree addresses sanitation, health care, fire safety, overcrowding, volunteers, access to courts, food service, management, operations and mail at SPSM-CC and called for the submission of more detailed remedial plans to carry out a number of the consent decree mandates. Overall, the consent decree was intended to "assure the constitutionality" of the conditions of confinement at SPSM-CC. The Court retained jurisdiction to enforce the terms of the consent decree until compliance is achieved. Plaintiffs' attorneys have responsibility for monitoring defendants' compliance with the decree, which continues to this day.

On November 19, 1987, the District Court entered an order awarding fees and costs to plaintiffs' attorneys for compliance monitoring. Plaintiffs construe this order as establishing their entitlement to post-judgment monitoring fees. Under the terms of this order, defendants have the right to review and make objections to plaintiffs' fee requests. In the absence of agreement, the District Court will resolve the fee dispute.

II. PROCEEDINGS BELOW

In *Glover* and *Hadix*, each class of plaintiffs filed a fee petition for work performed from January 1, 1996 through June 30, 1996 pursuant to established procedure. Appeal Nos. 96-2586/2588 and 96-2567/2568. The *Glover* plaintiffs filed a second fee petition that covered all outstanding fees and costs related to work on two appeals. Appeal No. 97-1272. Defendants objected on several grounds to all three petitions. The District Court rejected all but one of the objections in three separate orders.

Defendants argued that the attorney fee limitation of the PLRA should be applied to the fee petitions in appeal nos. 96-2586/2588 and 96-2567/2568. In nearly identical opinions, the District Court held the fee provision inapplicable to fees earned before enactment of the PLRA but applied it to those earned thereafter.

Defendants also objected to fees for work on all appellate matters in the *Glover* fee petitions in appeal nos. 96-2586/2588 and 97-1272, which included work on three appeals, because plaintiffs had not prevailed in these matters. The first involves Case No. 94-1617, a 1996 appeal regarding defendants' obligation to provide legal assistance to plaintiffs for parental rights matters. This case has been decided against plaintiffs and the Supreme Court has denied their petition for certiorari. *Glover v. Johnson*, 75 F.3d 264 (6th Cir.) (*"Glover IV"*), *cert. denied*, 117 S. Ct. 67 (1996) (hereinafter referred to as the "parental rights appeal"). The second involves appeal nos. 95-1903/95-2037/95-2120/96-1155, consolidated appeals regarding a Compliance Committee established by the District Court (hereinafter referred to as the "Compliance Committee appeals"). These appeals were voluntarily dismissed by stipulation of the parties in March, 1996 upon dissolution of the Committee by the District Court. The third involves appeal no. 95-1521, an appeal regarding the District Court's denial of defendants' motion to terminate the District Court's supervisory jurisdiction because substantial compliance with the Remedial Plan had been achieved (hereinafter referred to as the "termination appeal"). We recently vacated this judgment, retained jurisdiction and remanded the matter to the District Court for a new determination of whether a disparity now exists between female and male inmates in educational and vocational opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment and whether female inmates are presently being denied access to the courts in violation of the First Amendment. *Glover v. Johnson*, ___ F.3d ___ (6th Cir. 1998) (*"Glover V"*).

In rejecting this challenge, the District Court concluded that plaintiffs were deemed prevailing parties in the 1985 Order, that plaintiffs are not required to establish prevailing party status each time fees are sought but instead need only establish that the legal work was reasonably related to ensuring compliance with the District Court's orders. The District Court went on to conclude that the legal work at issue in all three appeals was related to monitoring compliance with the Remedial Plan and consequent court orders.

The District Court also rejected defendants' objection that the award in No. 96-2586/2588 was otherwise unreasonable as conclusory and unsubstantiated. Finally, the District Court declined to increase the rate of payment for a paralegal to the prevailing market rate because she had been approved at an established lower rate. Defendants and plaintiffs filed timely notices of appeal and cross-appeal.[1]

III. THE APPLICABILITY OF THE PLRA TO THESE ACTIONS

A. Statutory Background

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), was signed into law by President Clinton on April 26, 1996.[2] The PLRA, which comprises 10 sections, significantly affects prison litigation by amending several provisions of the United States Code.[3] The Act was intended to curtail what was perceived to be the over

1 Plaintiffs filed a motion for reconsideration of the constitutional challenges they made to the PLRA's fee provision in *Glover*, No. 96- 2586/2588, which the court denied. Plaintiffs timely appealed the denial of its motion. Because we decide that the PLRA fee provision is inapplicable to this case, we need not and do not reach plaintiffs' constitutional arguments.

2 The Act is found in Title VIII of the omnibus appropriations bill for fiscal year 1996 for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies.

3 The Act amends the following: 18 U.S.C. § 3626 (Section 802 - Appropriate Remedies For Prison Conditions); 42 U.S.C. § 1997 (Section 803 - Amendments To Civil Rights Of Institutionalized Persons Act); 11 U.S.C. § 523(a) (Section 804 - Proceedings In Forma Pauperis); 28 U.S.C. §§ 1915 (Section 804 - Proceedings In Forma Pauperis); 23 U.S.C. § 1346(b) (Section 806 - Federal Tort Claims); and 18 U.S.C. § 3624(b) (Section 809 - Earned Release Credit or Good Time Credit Revocation). The Act also adds provisions, including new sections 1915A (Section 805 - Judicial Screening) and 1932 (Section 809 - Earned Release Credit or Good Time Credit Revocation) to title 28 of the United States Code.

involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees such as those involved in *Glover* and *Hadix*.[4] The second purpose of the Act was to stem the tide of frivolous prisoner suits.[5] Today we focus on section 802, which serves the first purpose identified above by limiting judicial remedies in prison condition litigation, and section 803, which serves the second statutory purpose enumerated above by amending the Civil Rights Of Institutionalized Persons Act, 42 U.S.C. § 1997, et seq. ("CRIPA").

Section 803(d) of the PLRA includes the provision governing the award of attorney fees in prisoner civil rights litigation. 42 U.S.C. § 1997e(d). It provides in relevant part:

> **§ 1997e. Suits by prisoners**
>
> * * *
>
> **(d) Attorney's fees**
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized

4 *See, e.g.*, 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) ("The legislation I am introducing today [S. 1275] will return sanity and State control to our prison systems by limiting judicial remedies in prison cases [such as those in the State of Michigan] . . . ."); 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) ("These guidelines will work to restrain liberal federal judges who see violations on [sic] constitutional rights in every prisoner complaint who have used these complaints to micromanage state and local prisons.").

5 *See, e.g.*, 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) (in addition to problems with "massive judicial interventions in state prison systems, we also have [the problem of] frivolous inmate litigation); 141 Cong. Rec. S14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) (legislation introduced, S. 1279, will address the "alarming number of frivolous lawsuits" filed by prisoners).

> under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

42 U.S.C. § 1997e(d)(1), (3). In the Eastern District of Michigan, $75 per hour is the maximum amount a court-appointed attorney may be reimbursed pursuant to 18 U.S.C. § 3006A(d)(1). The established rate of pay for plaintiffs' attorneys in both cases has been $150 per hour since at least 1993. Capping attorney fees at $112.50 (which represents 150% of the $75 maximum) would reduce plaintiffs' attorneys' hourly rate by 25%. Whether or not we apply the fee provision to the attorney fee petitions at issue in these pending cases turns on matters of statutory construction and congressional intent.

B. Judicial Construction Of PLRA Section 803(d)

1. *Landgraf v. USI Film Products, Inc.*

The analytical framework to be used when determining whether to apply a newly-enacted law to pending cases, or whether such application is impermissible because it would have retroactive effect is set forth by the Supreme Court in *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994). In step one of the *Landgraf* analysis, a court determines whether

Congress clearly defined the temporal reach of a new law. *Id.* at 257-63, 280. Where Congressional intent is clear, it is controlling. *Id.* at 264. If Congressional intent is ambiguous, a court must proceed with step two, an analysis of retroactivity.

The long-standing presumption against retroactive legislation does not arise every time a statute is applied to a pending case or when its application would upset settled expectations. *Id.* at 269 Rather, a statute operates retroactively when it "attaches new legal consequences to events completed before enactment" or "impair[s] rights a party possessed when he acted." *Id.* at 269, 280. The determination of retroactivity is made after assessing "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. Judicial inquiries should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* Retroactive legislation will not be applied in absence of manifestly clear Congressional intent. *Id.* at 280.

2. *Glover V*

In *Glover V*, *supra*, we analyzed the attorney fee limitation under *Landgraf* in the context of a petition for fees for work completed before enactment of the PLRA but awarded after enactment. Under step one, we held that Congress had not explicitly prescribed the temporal reach of the provision. Slip Op. at pp. 40-41. In so doing, we rejected the Fourth Circuit's view that the plain language of the statute providing that fees "shall not be awarded" except as provided, evinces clear congressional intent that all post-enactment fee awards, including those compensating for pre-enactment work, must comply with section 803(d). *Id.* at 41 (declining to follow *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998)). Under step two of *Landgraf*, we held that application of section 803(d) to a pending fee motion which sought compensation for work completed prior to enactment would be impermissibly retroactive because it would "attach[] significant new legal burdens to the completed work . . . [and impair] rights acquired under pre-existing law." *Id.* at 43. We thus concluded that Congress did not intend the statute to be

applied retroactively. We expressly limited our holding to work completed prior to enactment. *Id.* at 44. Now that we are squarely presented with the issue of post-enactment work in a pending case, we believe that our earlier conclusion regarding retroactivity controls the application of the very same statutory language to post-enactment fees.

Under *Landgraf*, the Court is to determine the temporal reach Congress intends a new statute to have in the absence of clear congressional intent. In *Hadix*, we determined that the attorney fee provision of section 803(d), as applied to a fee petition for pre-enactment work, would be impermissibly retroactive. From this conclusion, it followed that the historic presumption against retroactive legislation arose to bar retroactive application of the statute. The presumption is invoked to interpret new statutory language overall, and we do not believe that the resulting statutory interpretation can be limited to specific circumstances. That certain applications of the statute might be permissible does alter the statutory construction unless it can be said that Congress possessed different intentions with respect to different applications.

In this case, a court would have to find that Congress relied upon the same statutory language to convey an intent that the temporal reach of the statute is dependent upon the timing of the work, i.e., that it intended the fee provision to apply in pending cases for post-enactment fees but did not intend the provision to apply in pending cases for pre-enactment fees. We do not believe the statutory language is capable of such a sophisticated construction; either the fee provision applies in pending cases or not. Our interpretation of section 1997e(d) in *Glover V* controls our interpretation of that section here. We therefore hold that the fee limitation is inapplicable to the fee petitions before us, which include work performed both prior to and after the enactment date.

While the *Glover* court did not rely upon the recent decision in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), that decision supports our conclusion regarding retroactivity. As in *Lindh*, we have the negative inference that section 803(d) is inapplicable to pending cases arising from the fact that Congress made section 802 expressly applicable to pending cases but did not do the same with section 803. We believe

that under *Lindh*, the artificial distinction between pre-enactment and post-enactment work breaks down. In addition, in *Wright v. Morris*, 111 F.3d 414, 418 (6th Cir.), *cert. denied*, 118 S. Ct. 263 (1997), we held that the plain language of the exhaustion requirement of section 803(d), 42 U.S.C. § 1997e(a), evinced Congress' intent that it not be applied to pending cases. Thus, *Wright* provides additional support for concluding that Congress did not intend to apply the fee provision to pending cases because the attorney fee provision, also part of section 803(d), contains very similar temporal language to that of the exhaustion requirement.

3. *Lindh v. Murphy*

In *Lindh*, the Supreme Court was presented with the question of whether a provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which amended the federal habeas statute, applied to an application for habeas corpus pending at the time the new statute was enacted. The Court held that because one section of the AEDPA explicitly applied to pending cases and the other relevant section did not, this evinced clear congressional intent that the latter would not apply to pending cases. *Lindh v. Murphy, supra*, 117 S. Ct. at 2063. The majority opinion appears to say that when general rules of statutory construction are employed to determine a new statute's temporal reach -- the first step of the *Landgraf* analysis -- and a court determines that Congress intended purely prospective application, i.e., no application to pending cases, then the court need not apply the judicial default rules employed in the second step of the *Landgraf* analysis because there is no risk of retroactive effect. *Id.* at 2062-63 ("Although *Landgraf's* default rules would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity . . . .").

In its approach, "[t]he Court relies on one canon of statutory interpretation, *expressio unius est esclusio alterius*, to the exclusion of all others." *Id.* at 2068 (Rehnquist, J., dissenting). "The Court's opinion rests almost entirely on the negative inference that can be drawn from the fact that Congress expressly made Chapter 154, pertaining to capital

cases, applicable to pending cases, but did not make the same express provision in regards to Chapter 153." *Id.* "Chapter 153" refers to sections 2242 and 2253-2255 of Chapter 153 of Title 28 of the United States Code, which are amended by sections 101-106 of the AEDPA. "Chapter 154" was created by section 107 of the AEDPA and refers to new sections 2261-2266 of Title 28. Congress chose to make Chapter 154 explicitly applicable to pending cases. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 107(c), 110 Stat. 1214, 1226 (1996) ("EFFECTIVE DATE. — Chapter 154 of title 28 . . . shall apply to cases pending on or after the date of enactment of this Act.") Congress did not say anything about the effective date of Chapter 153. The Court read section 107(c), which made Chapter 154 explicitly applicable to pending cases, as "indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Lindh v. Murphy, supra*, 117 S. Ct. at 2063.

The Court distinguished procedural amendments, which it recognized would most likely be applied to pending cases. *Id.* (citing *Landgraf*, 511 U.S. at 275)[6]. The Court also suggested that had the legislative history of the two chapters been different, it might have reached a different result. *Id.* at 2064. Though the two chapters began in separate bills in separate houses, they were brought together in the same bill before section 107(c) was added. "The insertion of § 107(c)

6 In *Landgraf*, the Court considered without deciding whether attorney fee provisions are procedural or whether they affect substantive rights. *Compare Landgraf*, 511 U.S. at 277 ("[a]ttorney's fee determinations are 'collateral to the main cause of action'") (citations omitted), with *Landgraf*, 511 U.S. at 292 (Scalia, J., concurring) ("holding a person liable for attorney's fees affects a 'substantive right'"). In *Glover V*, we rejected the argument that attorney fee provisions can never result in retroactive effect because they may be procedural in nature or are collateral to the main cause of action. *Glover V, supra*, at 43. "[L]aws regulating litigation conduct [including attorney fee provisions] often impact the substantive rights of the parties as well. . . [and must be scrutinized under the Supreme Court's retroactivity analysis]. *Id.*

with its different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 2065 (citing *Field v. Mans*, 116 S. Ct. 437, 446 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example to contrasting statutory sections originally enacted simultaneously in relevant respects.")).

4. *Legislative History of the PLRA*

Section 802 of the PLRA contains a provision similar to that found in chapter 154 of the AEDPA making the section applicable to pending cases.[7] On the other hand, section 803 of the PLRA does not contain an effective date, just like chapter 153 of the AEDPA. The legislative history of sections 802 and 803 of the PLRA is slightly different than that of Chapters 153 and 154 of the AEDPA. The PLRA represents the culmination of efforts to reform two areas of prison litigation. First, the reformers desired to deter federal courts from so closely managing state prison systems in the context of supervising compliance with judicial decrees mandating remedies for unconstitutional prison conditions in litigation that has, in states such as Michigan, spanned decades. Second, the reformers sought to deter the "torrent" of frivolous civil rights lawsuits filed by prisoners.

Congress first proposed reform legislation in Titles II and III of the Violent Criminal Incarceration Act of 1995. H.R. 667, 104th Cong. (1995). Title II -- entitled Stop Turning Out Prisoners or STOP -- addressed the "judicial remedies" concern. "The purpose of the STOP Act is to keep our Federal courts from taking over State prisons." 141 Cong. Rec. S2648-02, S2649 (daily ed. Feb. 14, 1995) (statement of Sen.

7 Section 802(b)(1) provides that section 802(a), which amends 18 U.S.C. § 3626, "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."

Hutchison)[8]. The STOP Act is the forerunner to section 802; both limit judicial remedies in prison condition litigation by amending 18 U.S.C. § 3626. Since, like section 802, the STOP Act was directed at ongoing litigation, it was made expressly applicable to pending cases. Significantly, the STOP Act included a limitation on attorney fees, which like the rest of the STOP provisions, was applicable to pending cases. Title III of H.R. 667 amended CRIPA and addressed the "frivolous lawsuit" concern. Title III is the forerunner to PLRA section 803; both intend to deter frivolous prisoner suits by amending CRIPA. Title III's CRIPA amendments were not given an effective date and, significantly, did not contain a limitation on attorney fees.

As it made its way through the legislative process, the provision limiting attorney fees was moved from the STOP Act to the CRIPA amendments in a bill introduced by Senator Abraham of Michigan. S. 1275, 104th Cong. (1995). S. 1275 continued to expressly apply the STOP Act to pending cases and to refrain from providing an effective date for the CRIPA amendments. Thus, the attorney fee limitation was moved from a section of the statute that was expressly applicable to pending cases to a section that did not contain an effective date. None of the measures in the CRIPA amendments directed at stemming frivolous lawsuits included an effective date. See S. 1275, 104th Cong. §§ 3-4 (1995). S. 1275 contains no reference to H.R. 667 nor any explanation of why the attorney fee limitation was moved from the STOP Act to the CRIPA amendments.

Additional and extensive CRIPA amendments were proposed in S. 866, a bill focused exclusively on stemming frivolous lawsuits. S. 866, 104th Cong. (1996). The provisions of S. 866 went on to become sections 803, 804, 805, 806 and 809 of the PLRA. S. 866 did not contain the STOP Act or any limitation on attorney fees. The sponsors of S. 866 subsequently introduced S. 1279, which incorporated the STOP Act of S. 1275 and the CRIPA amendments of S. 866. The STOP Act was made expressly applicable to pending cases and the CRIPA amendments were not. S. 1279 placed

8 Senator Hutchison of Texas introduced S. 400 in the Senate, which was identical to Title II of H.R. 667.

the attorney fee-limitation in the CRIPA amendments, which is where it would remain through passage of the PLRA.

In the instant case then, "the language raising the implication" was not inserted *after* the STOP and CRIPA amendments had been joined in one bill as was the case in *Lindh*. *Lindh v. Murphy, supra*, 117 S. Ct. at 2065. We believe that any negative inference drawn from Congress' decision to move the attorney fee provision from STOP to CRIPA is weaker than the inference drawn in *Lindh*. Nonetheless, the identical negative inference that was drawn in *Lindh* can be drawn when sections 802 and 803 are compared. Furthermore, nothing in the PLRA's legislative history suggests that Congress intended section 803 to apply to pending cases. In fact, we believe that the legislative history suggests otherwise. As discussed above, the STOP Act arose to address the perceived excesses of the federal judiciary in *pending* litigation such as the instant cases and was logically made expressly applicable to pending cases. In contrast, the CRIPA amendments are forward looking as they are aimed at curtailing the *filing* of frivolous lawsuits. We have found nothing to suggest that the CRIPA amendments were aimed at pending litigation. This interpretation is also consistent with *Wright v. Morris, supra*, which held the exhaustion requirement of section 803(d) inapplicable to pending cases.

5. *Wright v. Morris*

PLRA section 803(d) governs the bringing of civil rights lawsuits by prisoners. Entitled "Suits by Prisoners", the section comprehensively amends section 7 of CRIPA, 42 U.S.C. § 1997e, which was formerly entitled "Exhaustion of Remedies." In addition to the attorney fee limitation, section 803(d) requires the exhaustion of administrative remedies before a prisoner may bring an action under section 1983. 42

U.S.C. § 1997e(a).[9] In *Wright v. Morris, supra*, this Court recently held that the plain language of the statute provides that this exhaustion requirement does not apply to pending cases.

> **§ 1997e. Suits by prisoners**
>
> **(a) Applicability of administrative remedies**
>
> *No action shall be brought* with respect to prison conditions under . . . [42 U.S.C. § 1983] by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

42 U.S.C. § 1997e(a) (emphasis supplied). Issued prior to *Lindh*, we declined to conclude that section 803 of the PLRA was inapplicable to pending cases based solely on the negative inference drawn from the fact that section 802 is expressly applicable to pending cases. *Wright*, 111 F.3d at 418. Instead, we relied upon the statutory text alone: "[T]he text of the new requirement plainly states that 'no action shall be brought' without exhaustion of administrative remedies." *Id.* We reasoned further:

> Thus, it is likely that had Congress intended the new requirement to pertain to pending cases it would have employed the same language as it used in § 802(b)(1) to make that intent clear. This strengthens our conclusion that the text of the PLRA indicates that the new administrative exhaustion requirement applies only to cases filed after the Act's passage.

Id. Even though we declined to rely solely upon the negative

9 Under section 803(d), a court may sua sponte dismiss a civil rights action filed by a prisoner, 42 U.S.C. § 1997e(c); a prisoner may not bring an action for emotional injury without a showing of physical injury, *id.* § 1997e(e); courts are instructed to conduct hearings by phone to the extent practicable, *id.* § 1997e(f); and civil rights defendants may waive their right to reply to a complaint without prejudice, *id.* § 1997e(g).

inference, we found the fact that section 802 contains a provision expressly applying it to pending cases to be significant.

Our interpretation of section 1997e(a) and reliance upon the negative inference that arises when section 803 is read together with section 802 is equally applicable when analyzing the attorney fee limitation. Section 1997e(d) admonishes that "fees shall not be awarded" in any way inconsistent with the rest of the subsection. This language is not meaningfully distinguishable from the temporal language of section 1997e(a), emphasized above, which provides that no action "shall be brought" prior to exhausting remedies and which we've interpreted as applying prospectively only.

C. Conclusion

In sum, our interpretation of section 803(d), 42 U.S.C. § 1997e(d), under *Landgraf* in *Glover V* controls our interpretation of that same section here. Because application of the attorney fee provision would have an impermissible retroactive effect in a pending case involving a petition of attorney fees for pre-enactment work, section 803(d) cannot be applied to pending cases regardless of when the underlying legal work is performed. Further, the fact that Congress chose to move the attorney fee provision from a section of the PLRA made expressly applicable to pending cases to a section without an effective date raises a negative inference under *Lindh* that Congress intended that the fee provision apply only to cases filed after enactment of the PLRA. Finally, under *Wright*, the plain language of section 803(d), 42 U.S.C. § 1997e(d), is prospective. For all of these reasons, we hold that the attorney fee provision of the PLRA is inapplicable to cases brought before the statute was enacted whether the underlying work was performed before or after the enactment date of the statute.

IV. THE PREVAILING PARTY STANDARD IN POST-JUDGMENT INSTITUTIONAL REFORM LITIGATION

We next turn to whether plaintiffs are prevailing parties in these various appeals.

A. The Law In The Sixth Circuit

1. *Glover v. Johnson (Glover III)*

In *Glover III*, this Court rejected the same "prevailing party" argument that is advanced by defendants here. We held that "plaintiffs may rely on the trial court's 1985 order to establish that they are prevailing parties and, pursuant to that order, plaintiffs have succeeded on a significant issue." *Glover III, supra*, 934 F.2d at 716. We also held that moving for contempt to compel compliance with earlier District Court orders is a compensable post-judgment monitoring activity. *Id.* at 715-16. (citing *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980)). In so holding, we rejected defendants' argument that prevailing party status was dependent upon the outcome of their appeal of the District Court's contempt findings. *Id.* We also upheld the award despite reversing the District Court in part because it interpreted its remedial order beyond the order's express terms in two areas. *Id.* at 712 (vocational training), 713 (work pass program). Thus, when plaintiffs seek fees for compliance monitoring, plaintiffs are not required to again establish prevailing party status, nor is the award dependent upon the outcome of an appeal.

2. *Northcross v. Board of Education of Memphis City Schools*

Defendants rely heavily, if not exclusively, on our statement in *Northcross* in their argument that plaintiffs are not entitled to fees unless they prevail on each post-judgment dispute. There we stated, "[t]he [1977] hearings [which involved plaintiffs' work defending a desegration plan from attack] were collateral to and distinct from the desegregation suit itself, which had been finally terminated in 1974, so had

the plaintiffs failed to prevail on the merits the district court would have been justified in denying fees altogether." *Northcross*, 611 F.2d. We believe that this reliance is misplaced for several reasons. First, because the *Northcross* plaintiffs prevailed in defending the remedy and because the Court held that plaintiffs are prevailing parties, this statement is dicta. Second, defending a remedy from collateral attack is indistinguishable from affirmatively moving for contempt to enforce compliance with the remedy because both activities share the same purpose of protecting court-ordered relief. See *Jenkins v. State of Missouri*, 127 F.3d 709, 717 (8th Cir. 1997) (compliance monitoring, enforcement of the remedy, and defense of the remedy are generally viewed as "necessary adjuncts to the initial litigation" and compensable). Finally, the *Northcross* dicta relied upon by defendants is inconsistent with *Glover III*, which held that compliance monitoring is compensable regardless of the degree of success or the outcome of appeals.

Glover III does not however definitively answer how courts should handle the prevailing party issue when unsuccessful legal work for which fees are requested does not relate to compliance monitoring or otherwise protecting a remedy previously affirmed or not appealed. In such cases, we elect to follow the approach outlined recently by the Eight Circuit.

In an ongoing school desegregation case involving the Kansas City School District, the Eighth Circuit had occasion to examine the prevailing party issue when the Supreme Court struck down the use of certain remedial measures employed in the court-approved desegregation plan. *Jenkins v. State of Missouri, supra*. Because the Supreme Court's decision did not affect the district court's underlying holding that the State of Missouri had committed constitutional violations and was obligated to remedy those violations, the court found that the decision did not "retroactively take away the Jenkins class's status as a prevailing party." *Id.*, 127 F.3d at 714 (discussing *Balark v. City of Chicago*, 81 F.3d 658, 665 (7th Cir. 1996) (holding that prospective termination of a 10-year-old consent decree pursuant to Rule 60(b) -- as opposed to reversal on direct appeal -- did not deprive plaintiffs of prevailing party status, which they enjoyed for 10 years). The Eighth Circuit

treated the prevailing party question as a "threshold" issue and went on to examine "whether fees should be awarded for matters on which the plaintiff lost." *Id.* at 716.

The *Jenkins* court applied the paradigm of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a case involving a civil rights plaintiff who had prevailed on some but not all issues, to the prevailing party issue surrounding post-judgment fees in institutional reform cases. *Id.* (citing *Assoc. for Retarded Citizens v. Schafer*, 83 F.3d 1008, 1010-12, (8th Cir.), *cert. denied*, 117 S. Ct. 482 (1996)). The test asks first whether the issues in the post-judgment litigation are "inextricably intertwined with those on which the plaintiff prevailed in the underlying suit or whether they are distinct." *Id.* at 717. Compliance monitoring, enforcement of the remedy, and defense of the remedy are generally viewed as "necessary adjuncts to the initial litigation" and compensable. *Id.* Other activities, such as efforts to expand the scope of the original relief obtained, may amount to the assertion of distinct new claims that cannot rest upon the prevailing party determination in the underlying case. *Id.* When the issues are intertwined, plaintiffs are entitled to fees, i.e., they maintain their prevailing party status. *Id.* at 718. If on the other hand, the issues are distinct, plaintiffs are entitled to fees only if they prevail on the separate issue. *Id.* at 717 (discussing *Arvinger v. Mayor and City Council of Baltimore*, 31 F.3d 196, 202 (4th Cir. 1994) and *Schafer, supra*, which denied prevailing party status on strength of underlying litigation under these circumstances). In applying this analysis to the facts before it, the *Jenkins* court concluded that the issues that went up to the Supreme Court were related to the issues on which the Jenkins class prevailed as the plaintiffs were placed in the position of defending the scope of the district court's remedial authority. *Id.* at 719.[10]

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10 The *Jenkins* court went on to examine the reasonableness of the fee award and reduced the fee amount by 50% to reflect plaintiffs' limited success. *Id.* at 718-20. We express no opinion on this portion of the decision.

B. Application of The *Glover III/Jenkins* Standard

1. *The Compliance Committee Appeals*

In yet another *Glover* appeal, appeal no. 96-1852, defendants raised the identical prevailing party issue with respect to the same Compliance Committee fees at issue here, albeit for a different time period. In our recently-issued decision, we held that plaintiffs were prevailing parties in these appeals by virtue of defendants' voluntary dismissal and that the work was otherwise compensable as post-judgment compliance monitoring. *Glover V*, *supra*, at 46. We therefore reject this portion of defendants' challenge.

2. *The Termination Appeal*

The analysis of the termination appeal fee award is controlled by *Glover III*. Defendants do not argue that the work was unrelated to ensuring compliance with court orders or that the work was unrelated to the underlying issues on which plaintiffs prevailed. As the District Court found: "[T]he relief sought amounted to a complete termination of the Remedial Plan. Work provided by plaintiffs' counsel on this issue was critically related to monitoring compliance with the judgment."[11] Rather, defendants argue that the prevailing party issue cannot be decided without awaiting the outcome of appeal no. 95-1521. As explained above, this argument was made and rejected once before. *Glover III*, 934 F.2d at 715-16.

Additionally, we vacated the judgment denying the motion to terminate in appeal no. 95-1521, and, in lieu of assessing whether substantial compliance has been achieved, we retained jurisdiction and remanded the matter to the District Court for a new determination of whether a disparity now exists between female and male inmates in educational

11 The District Court had ruled in an earlier opinion of May 30, 1996, that a decision on fees related to work on No. 95-1521 would be stayed pending the outcome of the appeal. However, the District Court must have reconsidered the issue because it granted both fee petitions involved here, which included fees for work in No. 95-1521.

and vocational opportunities in violation of the Equal Protection clause of the Fourteenth Amendment and whether female inmates are presently being denied access to the courts in violation of the First Amendment. *Glover V*, supra, pp. 26-28. Given this outcome, we hold that plaintiffs have prevailed in appeal no. 95-1521. We further hold that this work qualifies as compensable post-judgment compliance monitoring because plaintiffs sought to protect the remedy ordered by the District Court for the equal protection violations and access to court violations it found so many years ago.

3. *The Parental Rights Appeal*

The remaining issue concerns the fees related to the parental rights appeal and petition for certiorari. This appeal originated when plaintiffs filed a motion for injunctive relief to compel compliance with the District Court's orders regarding court access. *Glover v. Johnson*, 850 F. Supp. 592 (E.D. Mich. 1994). Plaintiffs were prompted by defendants' notice of decision to reduce funding for Prison Legal Services ("PLS"), the agency which provides legal assistance to female inmates, and to wholly eliminate PLS' provision of legal assistance on parental rights matters. The District Court interpreted its earlier orders on court access as having ordered the indefinite continuation of defendants' contract with PLS, which since 1978 had required PLS to provide assistance in the area of parental rights, and held defendants in contempt of those earlier orders. *Id.* at 594. The District Court also concluded that the elimination of legal assistance in the area of parental rights would violate plaintiffs' newly-enunciated constitutional right to legal assistance in parental rights matters. *Id.* at 595-601.

The district court proceedings were broader than those on appeal. What is relevant for our purposes here is not what happened below, but instead the issues litigated on appeal. Appeal no. 96-1617 was limited to whether defendants were required by court order or by the Constitution to provide plaintiff inmates with legal assistance in parental rights matters. Plaintiffs lost on both issues. *Glover IV*, *supra*, 75 F.3d 264.

In reversing, we first held that the court had abused its discretion in holding defendants in contempt because we found no order requiring the funding of legal assistance in any particular area of law. In the absence of a violated order, the contempt finding could not be sustained. *Id.* at 267. Next, we held that defendants are not constitutionally required to provide plaintiffs legal assistance in parental rights matters. *Id.* at 269. The Supreme Court denied plaintiffs' petition for certiorari. 117 S. Ct. 67 (1996).

In awarding fees for appellate work on this matter, the District Court acknowledged this Court's conclusion that defendants had provided legal services for parental rights matters without the support of a direct order but nevertheless concluded that the "work done by plaintiff contesting the termination of services was a post-judgment monitoring activity and is therefore compensable." We disagree with this conclusion. Given the lack of any remedial order, plaintiffs' counsel's efforts might best be characterized as a failed offensive attempt to expand the remedy. In such circumstances courts are less inclined to award fees. *See, e.g., Ustrak v. Fairman,* 851 F.2d 983, 990 (7th Cir. 1988). Plaintiffs' attorneys' efforts do not qualify as post-judgment compliance monitoring and plaintiffs cannot rely upon their status as prevailing parties in the underlying litigation. We therefore reverse this portion of the challenged awards given plaintiffs' lack of success in appeal no. 96-1617 and in the petition for certiorari to the Supreme Court.

C. Conclusion

Defendants' challenges to the award of fees for work on the Compliance Committee appeals and on the termination appeal are rejected because the work is compensable compliance monitoring and because plaintiffs prevailed. Defendants' challenge to the award of fees for the unsuccessful work on the parental rights appeal and petition for certiorari is sustained because this claim went beyond the underlying litigation and plaintiffs did not prevail.

V. OTHER ISSUES ARISING IN *GLOVER*

A. The District Court's Denial of Defendants' Objections To The Award As Unreasonable Was Not Clearly Erroneous

Defendants objected to 47.4 hours in plaintiffs' fee petition as "frivolous" and "unnecessary"; 48.7 hours as "excessive" and "inappropriate"; and 18.9 hours as "non-Glover" related. The District Court found that "defendants' broad objections and conclusory allegations" were an insufficient basis for denying these fees.

On appeal, defendants make absolutely no effort to add specificity to their objections or to otherwise substantiate their claims. Defendants argue that plaintiffs have filed "unnecessary" and "frivolous" pleadings *without identifying those pleadings* for this Court or explaining why any such pleadings were unnecessary or frivolous. Defendants' argument that certain fees were "non-Glover related" is just a rehashing of their "prevailing party" argument, which we have rejected on numerous occasions. The District Court was not clearly erroneous in rejecting defendants' objections as an insufficient basis to deny fees which have been carefully documented by plaintiffs' counsel.

B. Whether the District Court Erred in Refusing to Approve An Award of Fees For Paralegals At The Prevailing Market Rate

Despite finding that $80 was well within the prevailing market rate for paralegals, the District Court refused to approve that rate because the rate established for paralegals in its order 1990 was $45 per hour. We conclude that the District Court did not abuse its discretion in so refusing. Plaintiffs could have submitted a petition for a higher rate before or while the services were being rendered if a higher rate was necessary.

C. Appeal No. 97-1218

The last appeal, No. 97-1218, involves a challenge to the District Court's order of January 31, 1997 enjoining

defendants from eliminating funding for provision of legal services to women prisoners at current levels. The order terminated by its own terms upon a decision in appeal No. 96-1931, which was pending at the time of the court's ruling. Thus, the issues raised in appeal no. 97-1218 became moot upon entry of our opinion in *Glover V*, *supra*, which decided, among others, appeal no. 96-1931.

VI. CONCLUSION

We dismiss appeal no. 97-1218 as moot. In appeal nos. 96- 2567/2568, 96-2586/2588 and 97-1272, we affirm in part, reverse in part and remand the cases to the District Court for a recalculation of the fee awards in a manner consistent with this opinion.

CONCURRENCE

NATHANIEL R. JONES, Circuit Judge, concurring. I generally concur in the majority's well drafted opinion. However, I write separately to express my disagreement with the majority's reversal of the district court's award of attorney's fees for work in the parental rights appeal, No. 96-1617, and the subsequent petition for certiorari to the Supreme Court. Although the plaintiffs were not ultimately successful in the appeal, I feel that this work, along with all of the other work plaintiffs' counsel performed in this case, was compensable post-judgment compliance monitoring and related to the underlying equal protection and access to court claims upon which plaintiffs prevailed in their original action. I would therefore affirm all of the fee awards in this case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al,

Plaintiffs, Case No. 80-73581

vs. Hon. John Feikens

PERRY JOHNSON, et al,

Defendants.
_____/

OPINION AND ORDER

I. BACKGROUND

Plaintiffs' counsel in this case request fees for work performed between January 1, 1996 and June 30, 1996 pursuant to established billing procedures in this case. Defendants contend that hours billed for work performed after April 26, 1996, the enactment date of the Prison Litigation Reform Act, Pub.L.No. 104-134, 1996 ("the Act' or "PLRA"), are subject to its limitation on fees.

Amending 42 U.S.C. §1997e, the provision of the PLRA at issue stipulates:

> No award of attorney's fees in an action (brought by a prisoner in which attorney fees are authorized] shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

§803(d)(7)(d)(3)- The hourly rate for court-appointed attorneys is $60 per hour unless the Judicial Conference of the United States determines that a higher rate not in excess of $75 per hour is justified for a particular circuit. 18 U.S.C.

§3006A(d)(1). The rate of pay for plaintiffs' counsel in this case has been established at $150 per hour. Under the PLRA, their rate would be reduced to $112.50 per hour (150% of the $75 maximum hourly rate for time expended in the Eastern District of Michigan).

The PLRA was enacted eleven years after a consent judgment was entered in this case. The issue before me is whether the PLRA's limitation on attorney fees applies to work done on this case after the effective date of the Act.

For reasons set forth below, I conclude that the PLRA-mandated cap on attorney fees applies to this case for work performed after April 26, 1996. As to the only other source of contention, 2') hours' work provided by plaintiffs' counsel in preparation of a brief regarding the constitutionality of the PLRA, I find that the length of time involved was not excessive.

II. APPLICATION OF THE PLRA TO ATTORNEYS' FEES

In *Landgraf v. USI Film Products*, 511 U.S. __, 114 S.Ct. 1483, 128 L.Ed.2d 299 (1994), the Supreme Court clarified how to resolve the conflict between the presumption that a statute should not be applied retroactively and the presumption that a court "should apply the law in effect at the time it renders its decision.'" *Bradley v. Richmond School Board*, 416 U.S. 69 , 711 (1974).

When a statute affects events which transpired in the suit before its enactment, a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf*, 114 S.Ct. at 1505.

' In an opinion and order dated May 30, 1996, 1 held that the PLRA's provisions on attorney fees do not apply to work performed before its enactment.

The PLRA is comprised of ten sections, only one of which (§802) specifies that it is to be applied to pending cases. The provisions that limit attorney fees are found in §803 of the Act, which, plaintiffs contend, signals the congressional intent for prospective application. As further evidence, plaintiffs point out that attorney fees provisions were originally included in §802 of the Act, but were removed from that section in the final version of the bill. Application of the PLRA to this case, they argue, would specifically read into the statute the very fee limitation Congress eliminated.

The negative inference plaintiffs urge me to draw is too attenuated to support a finding of congressional intent. In *Hutto v. Finney*, 437 U.S. 678 (1977), a prison conditions case in which attorney fees were granted against a state government, the Court referred to express indications of congressional intent in the legislative history to uphold the award of fees. *Id.* at 694. But in *Landgraf* the Court tempered its reliance on statements made in the Congressional Record in observing that conflicting opinions more closely reveal partisan statements than congressional intent. *Landgraf*, 114 S. Ct. at 1495. Here there are no statements at all concerning the issue of retroactivity; there are only conflicting placements of a provision in a bill as it made its way through Congress. This fact is insufficient to evince congressional intent

Absent legislative guidance, my next inquiry is whether application of the statute would have a retroactive effect. If so, it will not be applied to this case. To determine whether a statute operates retroactively,

> the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 114 S.Ct. at 1499. Factors to be considered to determine a statute's retroactive effect are whether it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*, 114 S.Ct. at 1505.

Plaintiffs' counsel have been entitled to fees in this case, and a specific system of payment and rate of pay has been established. Changing the rate from $150 to $112.50 per hour, according to plaintiffs, is a drastic reduction over market rates, particularly in light of the spiraling litigiousness of this case in the last two years. They contend that application of §803(d) would fail to protect their "reasonable reliance" and "settled expectations'" in having their counsel paid comparably to the prevailing market rate and that such a change would occur without providing them "ample notice" since this case was filed so long before the introduction of the PLRA.

It is true that "settled expectations should not be lightly disrupted." *Id.*, 114 S. Ct. at 1483. As explained by the Court in *Landgraf*, a free and changing society needs to be protected from the danger of arbitrary or vindictive power exercised over past conduct. *Id.* at 1497-98. This principle was encapsulated in the Supreme Court's admonition that a law should not be applied retroactively if doing so "would result in manifest injustice." *Bradley*, at 711.

I conclude that this Act would not impair plaintiffs' or their counsel's rights to the extent that its application would be impermissibly retroactive. I am guided by the Supreme Court's observation that application of a statute which "authorizes or affects the propriety of prospective relief" is not retroactive, *Landgraf*, 114 S.Ct. at 1501, the rationale being that "'relief by injunction operates *in futuro*' and that plaintiff has no 'vested right' in the decree entered by the trial court." *Id., citing American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

The rate of pay in this case has been adjusted in keeping with the prevailing market rate. Considering the fact that court-appointed counsel in this district are paid the maximum amount allowed by statute, and the fact that the PLRA's cap

is 150% of that amount, I cannot say that Congress's intent to limit plaintiffs' counsel to $112.50 per hour is so fundamentally unfair as to result in manifest injustice. Nor can I say that this legislation unreasonably disrupts settled expectations. "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." 114 S.Ct. at 1499, n.24, *quoting* L. Fuller, The Morality of Law. 51-62 (1964).

III. 23 HOURS IN DISPUTE ON THE PLRA BRIEF

Defendants object to 23 hours of attorney fees (17.2 hours for Patricia Streeter and 5.8 hours for Michael Barnhart) accumulated in preparing a brief in response to defendants' motion to terminate the consent decree in this case pursuant to the PLRA. It has been acknowledged by both parties that the brief is based on a memorandum of law prepared by the Legal Aid Society - Prisoner Rights Project and submitted in *Benjamin v. Jacobsen*, United States District Court (S.D.N.Y.) No. 75-Civ-3073. Claiming that only seven original sentences were added by plaintiffs' counsel, defendants object to the 23 hours spent as unreasonable.

The brief submitted to this court was 83 pages long, presented three distinct constitutional arguments, and included a detailed factual affidavit explaining facts from the 16-year history of this case. I note that without the memorandum at their disposal plaintiffs' counsel would have been required to spend far greater than 23 hours to prepare an adequate response. Considering the magnitude and complexity of this issue, I believe that 23 hours of preparation time is well within the realm of reason.

IV. CONCLUSION

IT IS ORDERED that the PLRA's limits on attorney fees apply to this case for work performed after the PLRA's enactment on April 26, 1996.

IT IS FURTHER ORDERED that plaintiffs re-submit fee requests for work performed between January 1, 1996 and June 30, 1996 in which counsel's fees are limited to $112.50 per

hour for time worked after April 26, 1996.

IT IS FURTHER ORDERED that upon receiving this revised request defendants pay plaintiffs' counsel for the contested 23 hours' work provided.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Dec. 4, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, *et al*,

Plaintiffs, **Case No. 77-71229**

vs. **Hon. John Feikens**

PERRY JOHNSON, *et al*,

Defendants.

OPINION AND ORDER

I. BACKGROUND

Plaintiffs' counsel in this case request fees for work performed between January 1, 1996 and June 30, 1996 pursuant to established billing procedures in this case. Defendants contend that hours billed for work performed after April 26, 1996, the enactment date of the Prison Litigation Reform Act, Pub.L.No. 104-134, 1996 ("the Act' or "PLRA"), are subject to its limitation on fees.

Amending 42 U.S.C. §1997e, the provision of the PLRA at issue stipulates:

> No award of attorney's fees in an action (brought by a prisoner in which attorney fees are authorized] shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

§803(d)(7)(d)(3)- The hourly rate for court-appointed attorneys is $60 per hour unless the Judicial Conference of the United States determines that a higher rate not in excess of $75 per hour is justified for a particular circuit. 18 U.S.C.

§3006A(d)(1). The rate of pay for plaintiffs' counsel in this case has been established at $150 per hour. Under the PLRA, their rate would be reduced to $112.50 per hour (150% of the $75 maximum hourly rate for time expended in the Eastern District of Michigan).

The PLRA was enacted 19 years after this case was filed. . The issue before me is whether the PLRA's limitation on attorney fees applies to work done on this case after the effective date of the Act.[1] Also before me is a host of objections to work performed by plaintiffs' counsel.

For reasons set forth below, I conclude that the PLRA-mandated cap on attorney fees applies to this case for work performed after April 26, 1996. I also find that defendants' objections to plaintiffs' fee requests are without merit, with the exception of defendants' objection to plaintiffs' requested rate of payment for the work provided by Gale Greiger.

II. APPLICATION OF THE PLRA TO ATTORNEYS' FEES

In *Landgraf v. USI Film Products*, 511 U.S. __, 114 S.Ct. 1483, 128 L.Ed.2d 299 (1994), the Supreme Court clarified how to resolve the conflict between the presumption that a statute should not be applied retroactively and the presumption that a court "should apply the law in effect at the time it renders its decision.'" *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974).

When a statute affects events which transpired in the suit before its enactment, a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Landgraf*, 114 S.Ct. at 1505.

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[1] In an opinion and order dated May 30, 1996, I held that the PLRA's provisions on attorney fees do not apply to work performed before its enactment.

The PLRA is comprised of ten sections, only one of which (§802) specifies that it is to be applied to pending cases. The provisions that limit attorney fees are found in §803 of the Act, which, plaintiffs contend, signals the congressional intent for prospective application. As further evidence, plaintiffs point out that attorney fees provisions were originally included in §802 of the Act, but were removed from that section in the final version of the bill. Application of the PLRA to this case, they argue, would specifically read into the statute the very fee limitation Congress eliminated.

The negative inference plaintiffs urge me to draw is too attenuated to support a finding of congressional intent. In *Hutto v. Finney*, 437 U.S. 678 (1977), a prison conditions case in which attorney fees were granted against a state government, the Court referred to express indications of congressional intent in the legislative history to uphold the award of fees. *Id.* at 694. But in *Landgraf* the Court tempered its reliance on statements made in the Congressional Record in observing that conflicting opinions more closely reveal partisan statements than congressional intent. *Landgraf*, 114 S. Ct. at 1495. Here there are no statements at all concerning the issue of retroactivity; there are only conflicting placements of a provision in a bill as it made its way through Congress. This fact is insufficient to evince congressional intent.

Absent legislative guidance, my next inquiry is whether application of the statute would have a retroactive effect. If so, it will not be applied to this case. To determine whether a statute operates retroactively,

> the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 114 S.Ct. at 1499. Factors to be considered to determine a statute's retroactive effect are whether it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.*, 114 S.Ct. at 1505.

Plaintiffs' counsel have been entitled to fees in this case, and a specific system of payment and rate of pay has been established. Changing the rate from $150 to $112.50 per hour, according to plaintiffs, is a drastic reduction over market rates, particularly in light of the spiraling litigiousness of this case in the last two years. They contend that application of §803(d) would fail to protect their "reasonable reliance" and "settled expectations'" in having their counsel paid comparably to the prevailing market rate and that such a change would occur without providing them "ample notice" since this case was filed so long before the introduction of the PLRA.

It is true that "settled expectations should not be lightly disrupted." *Id.*, 114 S. Ct. at 1483. As explained by the Court in *Landgraf*, a free and changing society needs to be protected from the danger of arbitrary or vindictive power exercised over past conduct. *Id.* at 1497-98. This principle was encapsulated in the Supreme Court's admonition that a law should not be applied retroactively if doing so "would result in manifest injustice." *Bradley*, at 711.

I conclude that this Act would not impair plaintiffs' or their counsel's rights to the extent that its application would be impermissibly retroactive. I am guided by the Supreme Court's observation that application of a statute which "authorizes or affects the propriety of prospective relief" is not retroactive, *Landgraf*, 114 S.Ct. at 1501, the rationale being that "'relief by injunction operates *in futuro*' and that plaintiff has no 'vested right' in the decree entered by the trial court." *Id., citing American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921).

The rate of pay in this case has been adjusted in keeping with the prevailing market rate. Considering the fact that court-appointed counsel in this district are paid the maximum amount allowed by statute, and the fact that the PLRA's cap

is 150% of that amount, I cannot say that Congress's intent to limit plaintiffs' counsel to $112.50 per hour is so fundamentally unfair as to result in manifest injustice. Nor can I say that this legislation unreasonably disrupts settled expectations. "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." 114 S.Ct. at 1499, n.24, *quoting* L. Fuller, The Morality of Law. 51-62 (1964).

III. DEFENDANTS' OBJECTIONS TO SPECIFIC FEES

A. Prevailing Party Issue

Defendants object to all work performed by plaintiffs' counsel involving matters within the jurisdiction of the United States Court of Appeals for the Sixth Circuit and the United States Supreme Court. This includes work on three appeals to the court of appeals by defendants and one petition of *certiorari* to the Supreme Court by plaintiffs. They also object to all work done in relation to my establishment of a Compliance Committee since that committee was ultimately dissolved and orders relating to it were vacated by my order dated January 5, 1996. The gist of defendants' argument is plaintiffs can not show that they are the prevailing party on these appeals and, therefore, are not entitled to reimbursement but instead are subject to a set-off for any fees previously paid.

I have previously held that plaintiffs are not required to be the prevailing party to be entitled to fees, and the law of the case doctrine precludes this issue from being relitigated. *Arizona v. California*, 460 U.S. 605, 618 (1983). In 1985 I ordered that plaintiffs are entitled to attorney fees and have since ruled that this order does not require plaintiffs to be the prevailing party to collect the award.[2] This position was subsequently upheld by the United States Court of Appeals for the Sixth Circuit. *Glover v. Johnson*, 934 F.2d 703, 715-16 (1991). In that decision, the court upheld the award of attorney fees because plaintiffs were seeking compliance with previous orders of this court.

In 1994 I ruled that defendants were in contempt of prior orders in this case when they unilaterally terminated legal services in child custody matters. Reversing my decision, the United States Court of Appeals for the Sixth Circuit concluded that no specific order was violated. The Supreme Court denied plaintiffs' petition for *certiorari*. Plaintiffs now request fees for time worked on those appeals.

Although it is has been decided that funding for legal services for custody matters was provided by defendants without the support of a direct order, I conclude that work done by plaintiff contesting the termination of services was a post-judgment monitoring activity and is therefore compensable. Detailed findings of fact have been made demonstrating that child custody services were a well-established practice in this case:

> On January 6, 1992, defendants entered into a one-year contract with [Prison Legal Services] to provide assistance in various areas including child custody, child visitation and parental neglect. This contract, and the services provided thereunder, was specifically entered into for the purpose of complying with this court's previous orders. Its *Statement of Purpose* is significant:
>
> > Whereas the STATE desires to establish a system that will provide indigent female offenders currently incarcerated at the ... Facility with selected legal services **as ordered by the court** in *Glover v. Johnson*.

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[2] See, for example, my memorandum opinion dated November 27, 1989 resolving defendants' objections to plaintiffs' attorney fees for the time period of 1987 through 1989.

Glover v. Johnson, 850 F.Supp. 592, 594 (E.D. Mich. 1994). The contract went on to specify that the areas of law in which services are provided: "Domestic relations including divorce, child custody, visitation disputes, and child neglect actions." *Id*. For years, lawyers for Prison Legal Services provided those services to inmates. *Id*. It was therefore not only reasonable but necessary to ensure compliance with established practices in this litigation for plaintiffs' counsel to contest defendants' termination of funding. The decisions by Sixth Circuit Court of Appeals and the Supreme Court would render unreasonable subsequent work performed on this issue, but those decisions do not detract from the fact that plaintiffs were seeking compliance before this issue was decided with finality. Their request for fees is appropriate.

Plaintiffs are therefore similarly entitled to fees on those matters on appeal and on those matters concerning the Compliance Committee.

B. <u>The Hourly Rate for Gale Greiger</u>

The rate established in this case in 1990 for paralegals was $45 per hour. Gale Grieger, a lawyer with four years' experience, was approved by me as a paralegal. Plaintiffs now request a rate of $80 per hour for work done by her. Defendants argue that all past increases in rates have occurred prior to the time of billing and that plaintiffs therefore should have requested the increased hourly rate for Grieger upon her appointment.

Plaintiffs cite the Michigan Bar Journal's 1994 Economic Survey which listed the rates for legal assistants with five years' experience at $75 per hour and the rates for associates with three years' experience at $85 to $135 per hour. They also refer to an affidavit indicating that the prevailing market rate for a paralegal in Ann Arbor was $60 to $65 per hour in 1990.

Plaintiffs may be correct in their contention that Grieger's education and experience make her rate of $80 per hour well within the prevailing mark-et rate; however, that is not the rate for which she was approved to work in this case, and no basis now exists for a retroactive increase in her hourly rate. I

therefore find that defendants are required to pay the established $45 per hour for her work.

C. **The Hourly Rate for Jeffrey Tillman**

Attorney Jeffrey Tillman's hourly rate was established at $110 per hour before the PLRA was enacted. Since the PLRA reduced the lead counsel's rate from $150 to $112.50 per hour, defendants argue that the proportional difference between counsel should continue to be recognized and Tillman's rate should thus be reduced to $82.50 per hour.

This theory is without support from the text and legislative history of the PLRA. The Act does not require all attorneys to be limited to a portion of the fair market rate for their services. It establishes a cap, and this attorney's fees are below that cap. The corresponding change in proportion between Tillman's rate and lead counsel's rate does not make his rate inappropriate.

D. **All Other Hours In Dispute**

Defendants object to a total of 47.4 hours as "frivolous" and 'unnecessary," to 48.7 hours as "excessive" and 'inappropriate,' and to 18.9 hours as non-*Glover* related. Plaintiffs counter that all of the work performed was reasonably related to monitoring defendants' compliance and that much of their work has been brought about by defendants' strategy in the last two years of contesting every motion, appealing every court order, and challenging every fee petition.

The standard for determining whether specific hours are compensable in the post-judgment monitoring setting are whether those hours were reasonably related to monitoring and ensuring compliance with the district court's orders. *Northcross v. Board of Ed. of Memphis City Schools*. 611 F.2d 624 (1979), *cert. den*. 447 U.S. 911 (1980). I find defendants' broad objections and conclusory allegations insufficient as a basis for denying these fees. Plaintiffs' counsel have specifically recorded their work and the costs they have incurred. They have also made a showing of a substantial amount of work completed in association with this case but

not billed to defendants. I see no basis for defendants' objections.

IV. CONCLUSION

IT IS ORDERED that the PLRA's limits on attorney fees apply to this case for work performed after the PLRA's enactment on April 26, 1996.

IT IS FURTHER ORDERED that plaintiffs re-submit fee requests for work performed between January 1, 1996 and June 30, 1996 in which counsel's fees are limited to $112.50 per hour for time worked after April 26, 1996 and Gale Grieger's fees are limited to $45 per hour.

IT IS FURTHER ORDERED that defendants, after receiving this revised request, compensate plaintiffs' counsel for all other fees contested in this motion.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Dec. 4, 1996

96-2567/2568/2586/2588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EVERETT HADIX, ET AL. (96/2567/2568); MARY GLOVER, ET AL. (96/2586/2588),	)	
Plaintiffs-Appellees/ Cross-Appellants,	)	
v.	)	ORDER
PERRY M. JOHNSON, DIRECTOR, ET AL.,	)	
Defendants-Appellants/ Cross-Appellees.	)	

BEFORE: KENNEDY, JONES, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

Filed June 18, 1998

(2)

No. 98-262

In The

Supreme Court of the United States

October Term, 1998

PERRY JOHNSON, et al.,

Petitioners,

v.

EVERETT HADIX, et al.,

Respondents.

PERRY JOHNSON, et al.,

Petitioners,

v.

MARY GLOVER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the attorney fee provisions of the Prison Litigation Reform Act, 42 U.S.C § 1997e(d), apply retroactively to cases pending on the date of enactment.

PARTIES TO THE PROCEEDING

Respondents do not dispute Petitioners' designation of parties.

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JURISDICTION

Respondents do not dispute this Court's jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Petition concerns two class actions involving prisoners under the jurisdiction of the Michigan Department of Corrections ("MDOC"). These cases were consolidated to address the applicability of the Prison Litigation Reform Act's ("PLRA" or "Act") 42 U.S.C. §1997e(d), attorney fee provisions to services performed both prior to and subsequent to the passage of the Act. *Hadix, et al. v. Johnson, et al.; Glover, et al. v. Johnson, et al.*, 143 F.3d 246 (6th Cir. 1998) (*"Hadix/Glover"*).

Both *Hadix* and *Glover* are pending cases in which the following acts occurred prior to the passage of the PLRA. 1) Judgments were entered placing the cases in a post-judgment remedial stage; 2) Plaintiffs were awarded fees as prevailing parties; 3) Court orders were entered establishing Plaintiffs' entitlement to attorney fees at a prevailing market rate; 4) The parties stipulated to orders entitling Plaintiffs to all reasonable post-judgment monitoring fees; and 5) Orders were entered establishing specific market rates to be paid for post-judgment monitoring.

The unique history and proceedings of the two cases are detailed below.

A. *Glover v. Johnson*

The procedural history of the *Glover* case is set forth in *Glover v. Johnson*, 931 F. Supp. 1360, 1362-1363 (E.D. Mich. 1996) and is not repeated here except as it relates to the instant appeal.

In 1977, Respondents (hereinafter "Plaintiffs") filed an action seeking a declaratory judgment for violation of their Equal Protection rights and their right to access to the courts. After a bench trial, the district court ruled that Petitioners (hereinafter "Defendants") had violated the Equal Protection Clause of the Fourteenth Amendment and failed to provide meaningful access to the courts to the Plaintiff class. A "final order" was subsequently entered detailing the steps Defendants were to take to remedy the found violations. *Glover v. Johnson*, 510 F. Supp. 1019, 1023 (E.D. Mich. 1981). Plaintiffs were thereafter found to be prevailing parties and awarded attorney fees pursuant to 42 U.S.C. §1980.

On November 12, 1985, the parties entered into a stipulated order entitling Plaintiffs to attorney fees for post-judgment monitoring of the court's decree and establishing a procedure for the submission of the attorney fees and costs.[1] Thereafter, Plaintiffs submitted petitions for attorney fees on a semiannual basis with the district court resolving any disputes as to the reasonableness of the fees or the appropriate market rate.

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[1] Current attorneys for the Plaintiffs entered their appearances in this case after entry of this order entitling Plaintiffs to compensation, at the prevailing market rate, for their post-judgment monitoring.

Throughout the 1980's, Defendants failure to obey the court's orders resulted in extensive findings of contempt and an order for Defendants to submit a remedial plan to cure the found Constitutional violations. *Glover v. Johnson*, 721 F. Supp. 808 (E.D. Mich. 1989), *aff'd*, 934 F.2d 703 (6th Cir. 1991). The Sixth Circuit also affirmed Plaintiffs' ongoing entitlement to attorney fees at the prevailing market rate for post-judgment monitoring. *Glover v. Johnson*, 934 F.2d at 715-716.

After remand, Defendants submitted a remedial plan to cure their contempt. In the course of monitoring Defendants' compliance, Plaintiffs submitted a petition for fees for the six month period of July 1, 1995 through December 31, 1995. Defendants submitted objections and while Plaintiffs' motion for settlement was pending, the Prison Litigation Reform Act of 1995 was signed into law. Defendants asserted that the Act applied to attorney fees for services performed prior to the passage of the Act and awarded after passage of the Act. The district court ruled that the PLRA did not apply to an award of attorney fees for legal services completed prior to the enactment of the PLRA which opinion was affirmed by the circuit court. *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998). Defendants sought no review of this opinion.[2]

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[2] At this time Defendants request to terminate the litigation was denied based on a finding that Defendants had not demonstrated substantial compliance. *Glover v. Johnson*, 879 F. Supp. 752 (E.D. Mich. 1995), *aff'd*, *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998) (remanding for hearings on the current status of parity between male and female prisoners in Michigan). In 1996, the district court again found Defendants in contempt of numerous court orders and issued sanctions. *Glover v. Johnson*,

Thereafter, Plaintiffs submitted a petition for the time period of January 1, 1996 through June 30, 1996. Ruling on Defendants' assertion that the Act should apply to hours worked both prior to and subsequent to the Act's passage, the district court reiterated its prior ruling that the PLRA's attorneys' fee provisions do not apply to pre-enactment services but applied the Act to services performed after its enactment. The Sixth Circuit in a consolidated appeal with a nearly identical opinion in *Hadix*, reversed and held that the fee limitations of the Act do not apply to these pending cases. *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998).

B. *Hadix v. Johnson*

This class action was filed in 1980 by male prisoners incarcerated in the Central Complex of the State Prison of Southern Michigan, asserting that the condition of their confinement violated their First, Eighth and Fourteenth Amendment rights.[3]

Five years later, the parties entered into a comprehensive consent decree designed to "assure the constitutionality of the conditions under which prisoners are incarcerated." The consent judgment addressed, *inter alia*, sanitation, safety, mental health, health care, medical, fire safety, overcrowding and protection from harm, access to

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931 F. Supp. 1360 (E.D. Mich. 1996), *aff'd* in part and *rev'd* in part, *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998).

[3] Built in 1926, this facility is still considered to be the largest walled prison in the world with over 57 ½ acres inside the Central Complex.

courts, food service, management, and mail. The consent degree further provided for the development and implementation of a "break-up" plan to alleviate constitutional violations in the central complex. *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998).

On November 19, 1987 the district court entered an order establishing Plaintiffs' entitlement to attorney fees for all reasonable post-judgment monitoring. Thereafter, Plaintiffs submitted and were compensated for fees at the prevailing market rate on a biannual basis. A specific market rate was established by the district court in 1991 and affirmed by the circuit court. *Hadix v. Johnson*, 65 F.3d 532 (6th Cir. 1995).

While the process established to complete the requirements of the Consent Judgment and bring finality to the case was proceeding, the PLRA became effective on April 26, 1996. Defendants moved for immediate termination of the consent decree and challenged Plaintiffs' entitlement to continued attorney fees asserting the PLRA's fee provisions applied to limit both pre- and post-enactment services.[4]

In proceedings which parallel the events in *Glover*, the district court held that the PLRA's fee provision did not apply to services performed prior to its enactment which ruling was affirmed by the Sixth Circuit. *Hadix v.*

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[4] The district court denied Defendants' motion to terminate finding the PLRA's termination provision unconstitutional. *Hadix v. Johnson*, 947 F. Supp. 1100 (E.D. Mich. 1996). The Sixth Circuit reversed and remanded the case for hearings to make findings regarding current and ongoing violations of Plaintiffs' Federal rights. *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998).

Johnson, 144 F.3d 925, 946 (6th Cir. 1998). Defendants sought no review of this decision.

Thereafter, Defendants challenged Plaintiffs' entitlement to post-enactment fees. The district court ruled that the application of the PLRA's fee provisions to post-enactment services would not constitute a retroactive application of the statute which holding was reversed by the Sixth Circuit in a consolidated opinion. *Hadix/Glover*, 143 F.3d 246 (6th Cir. 1998). Defendants now seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT CORRECTLY HELD THAT SECTION 803(d) OF THE PLRA DOES NOT APPLY TO LIMIT ENTITLEMENT TO ATTORNEY FEES IN CASES PENDING ON THE DATE OF ITS ENACTMENT.

The statute at issue states:

(d) **Attorney's fees**

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that

(A) the fee was directly and reasonably incurred in proving an actual violation of the Plaintiffs' rights protected by a statute pursuant to which fees may be awarded under section 2 of the Revised Statute; and

(B)(i) the amount of the fee is proportionally related to the court ordered relief for the violation; or (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

* * *

(3) No award of attorney fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under Section 3006A of Title 18, United States Code, for payment of court appointed counsel.

A. The Statutory Language Of The PLRA's Fee Provisions Do Not Clearly And Unambiguously Indicate Congressional Intent To Apply Its Limitations To Pending Cases.

The first question to be asked in determining whether a statute applies to pending cases is whether Congress has expressly resolved, by clearly stating in unambiguous language, that the statutory provisions at issue apply to pending cases. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). This Court recently emphasized its ruling in *Landgraf* that in order to apply a statute retroactively there must be an 'extraordinarily clear statement of Congressional intent' for retroactive application. *Lindh v. Murphy*, 117 S.Ct. 2059 (1997).[5]

[5] Demonstrating the rigor with which this Court enforces its 'clear statement' rule, *Lindh* gave as an example of *possible* unambiguous intent the following language: "This Act shall apply to all proceedings pending on or commenced after the date of the enactment of the Act." *Lindh, supra* at 2064 n. 4, *citing Landgraf v. USI Film Products*, 511 U.S. 244, 260 (1994).

The statutory language at issue in *Lindh*, requiring that "an application for writ of habeas corpus shall not be granted," except as otherwise provided, was found not sufficiently clear to overcome the longstanding presumption against retroactive legislation. The language at issue in §803 of the PLRA parallels the language at issue in *Lindh*, requiring that: "fees shall not be awarded" except as otherwise provided, and similarly fails to meet the stringent requirement of an expression of Congressional intent to apply the Act to pending cases. *Hadix/Glover*, Apx. at 10a (referencing the circuit court's prior opinion in *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998)).[6]

Absent unequivocal language prescribing the temporal reach of the statute and in the face of clear retroactivity language in another section of this statute, the Sixth Circuit correctly ruled that the PLRA's fee provisions, set forth in §803(d), are inapplicable to fee petitions for work performed both prior to and after the PLRA's enactment date.[7]

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[6] The vast majority of district courts and the Second, Sixth,, Seventh and Eighth Circuits have held that the statute's language does not evince a sufficiently clear intent to apply the fee limitations of the PLRA to pending cases. *Blissett v. Casey*,, 147 F.3d 218 (2nd Cir. 1998); *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998); *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996). The existence of these cases refute the Defendants' assertion that the statute so clearly applies to pending cases that "the text is simply not susceptible to another meaning." Defendants' Petition at p. 10 relying on *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998), *reh'g pet. filed*.

[7] The Sixth Circuit correctly rejected the distinction between pre- and post-enactment fees under the PLRA as such a distinction would require an interpretation of the same

B. Absent Clear Evidence Of Legislative Intent To Apply The Statute Retroactively, Application Of The Canons Of Statutory Interpretation Mandate That The PLRA Fee Provisions Not Be Applied To Pending Cases.

In *Lindh*, this Court was asked to decide whether certain provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), which amended the federal habeas statute, applied to an application for habeas pending at the time the new statute was enacted.[8] The court held that because one Section of the AEDPA explicitly applied to pending cases and the other relevant section did not, this evidenced clear congressional intent that the latter section would *not* apply to pending cases. *Lindh v. Murphy*, 117 S.Ct. at 2063.

Application of this statutory analysis to the PLRA requires the same conclusion. The attorney fee provisions of the PLRA, amending 42 U.S.C. §1997e are found in §803 of the Act. This section is silent as to whether it

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statutory language to convey Congressional intent to apply §803 to pending cases for post-enactment fees but not apply it to pending cases for pre-enactment fees. Accordingly, the court stated: "We do not believe the statutory language is capable of such a sophisticated construction; either the fee provision applies to pending cases or not." Apx. at 11a-12a.

[8] The AEDPA consists of two chapters, one of which governs capital cases and explicitly provides that it "shall apply to cases pending on or after the date of enactment of this act." The other chapter – the one at issue in *Lindh* – governs non-capital cases and provides only that "[a]n application for a writ of habeas corpus . . . shall not be granted" except as provided. 28 U.S.C. Section 2254(d). *Lindh, supra* at 2063-2065.

should be applied retroactively to pending cases or prospectively to cases filed after the Act's passage. In stark contrast, §802 of the Act, which addresses "appropriate remedies" in prison conditions litigation explicitly provides that the section is to be applied to pending cases stating:

> Section 3626 of Title 18 United States Code as amended by this Section shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.[9]

This Court held that the nearly identical difference between two sections of the AEDPA indicated Congress' intent that the latter provision should be applied only to cases filed after enactment of AEDPA. *Lindh*, 117 S.Ct. at 2063. This Court found this "negative implication" to be particularly pronounced because "the two chapters had already been joined together [in a single bill] and were being considered simultaneously when the language raising the implication was inserted," although they began

[9] The Sixth Circuit detailed the legislative history of the PLRA noting that as it made its way through the legislative process the two sections were originally joined together with the attorney fee and other remedy provisions PLRA appearing together in a single section subject to an explicit statement of applicability to all pending cases. Thereafter the attorney fees provision was extracted from this section and transferred to a new section of the bill (Section 803) which did not contain a retroactivity provision. The statute retained this structure until its final passage. *Hadix/Johnson*, Apx. at 14-16a.

life independently and in different houses of Congress. *Id.* at 2065.[10]

While noting distinctions between the PLRA and AEDPA the circuit court found that the "identical negative inference that was drawn in *Lindh* can be drawn when Sections 802 and 803 are compared."[11] The

[10] The *Lindh* Court thereafter ruled that where there is no risk of retroactive effect, the Court need not apply the judicial default rules traditionally employed in the second step of this Court's analysis in *Landgraf* stating: "Although *Landgraf's* default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as *Lindh* argues the recognition of a negative implication would do here. In sum, if the application of a term would be retroactive as to *Lindh*, the term will not be applied, even if, in the absence of retroactive effect, we might find the term inapplicable; if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply to *Lindh*." *Lindh*, 117 S.Ct. at 2063.

[11] Defendants' attempt to provide an alternate explanation for explicit retroactivity language appearing in §802 and not in §803 is unpersuasive. Defendants speculate that Congressional awareness of ongoing cases involving prospective relief necessitated Congress making their intent to apply the provisions of §802 to pending cases absolutely clear. Defendants' Petition at p. 15. However, Defendants acknowledge that Congress was also aware and expressed their concern with the ongoing costs (which would include monitoring fees) associated with pending cases and Congressional awareness of the presumption against retroactivity and the need for clearly expressed intent must be presumed. Defendants' Petition at p. 21 n. 9. Similarly, Defendants' attempt to characterize one section of the statute as

Congressional removal of the attorney fees provisions from the section which explicitly provided for its application to pending cases, to a section which did not so provide, evinces Congressional intent that this provision is only to be applied prospectively, i.e., to prisoner cases brought after the effective date of the Act.

Where application of the canon of statutory interpretation, *expressio unius est esclusio alterius*, demonstrates Congressional intent that the statute is not to be applied to pending cases, the court need not proceed to decide whether such application would be manifestly unjust. While, the Sixth Circuit, relying upon *Lindh*, held that in light of the ambiquity of the statutory language and the application of the canons of statutory construction to the statute's legislative history, one need not resort to the application of "judicial default rules," to conclude that the Act does not apply to pending cases. Application of these rules to the present case would result in the same conclusion, for different reasons.

C. Application Of The PLRA's Fee Provisions To The Litigation At Issue Would Constitute An Impermissible Retroactive Application Of The Act Resulting In Manifest Injustice To The Plaintiffs.

The judicial default rules are guided by the presumption against retroactively applying laws to pending cases absent clear legislative intent:

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primary or substantive and another as procedural is not determinative with respect to this retroactivity analysis. *Lindh*, 117 S.Ct. at 2070, (Rehnquist, C.J., dissenting).

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to perform their conduct accordingly; settled expectations should not be lightly disrupted. *Id.* at 1497. (internal footnote omitted).

If Congressional intent regarding a statute's reach remains unclear, a court's next task is to determine whether application of the statute to a case based on events that occurred before the statute's passage would have a retroactive effect.

> [F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance. *Id.* at 1499-1500.

In describing circumstances that constitute impermissible retroactive effect, this Court noted that:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retroactive. *Landgraf, supra* at 1505.[12]

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[12] This language does not purport to define the outer limit of impermissible retroactivity. This Court clarified that its opinion in *Landraf* "[M]erely described that any such effect constituted a sufficient, rather than a necessary, condition for invoking the presumption against retroactivity. Indeed, we recognized that the Court has used various formulations to describe the 'functional conception of legislative 'retroactivity,' and made no suggestion that Justice Story's formulation was the

Application of the PLRA's attorney fee provisions to these cases would deny Plaintiffs "fair notice" and have an impermissible retroactive effect that would result in manifest injustice to the Plaintiffs.

Plaintiffs counsel undertook this litigation with the settled expectation that they would be compensated for the hours that were reasonably spent litigating the case at the prevailing market rate for attorneys with similar experience and skill.[13] If the attorney fee provisions of the PLRA are applied to this case, Plaintiffs' counsel would be compensated well below market rates for hours reasonably spent in successfully litigating the case and insuring compliance with the orders of the court and the Constitution.

The reduction brought by the PLRA's restrictions would attach crippling new legal consequences to events completed before the PLRA's enactment – the assumption of this representation for these Plaintiffs at the expense of handling other litigation – and take away rights acquired under then-existing laws and preexisting court orders in this case.[14]

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exclusive definition of presumptively impermissible retroactive legislation." *Hughes Aircraft Co. v. United ex rel. Shumes*, 117 S.Ct. 1871, 1876 (1997).

[13] This "settled expectation" was based in part on judicial findings, that Plaintiffs' counsel were entitled to such fees. *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991); *Hadix v. Johnson*, 65 F.3d 532 (6th Cir. 1995).

[14] As recognized by the court in *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996): "Nothing in this portion of the Act expressly prescribes its reach. The Act was not in effect when the plaintiffs' attorneys accepted this appointment, when

The relevant event for measuring expectations of attorney fees is not, as Defendants argue, the date counsel performed work but rather the date counsel agreed to take the case.[15] It is at that point in time that Plaintiffs evaluate the case and balance the likelihood of success with expectations of reimbursement at a reasonable rate should they prevail. It is at this time that Plaintiffs' counsel commit themselves ethically to continued representation of a class of prisoners to ensure that the Constitution is honored. Plaintiffs' counsel could not thereafter ethically discontinue their representation despite the potential financial hardship. *Mallard v. United States Dist.*

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liability and fee determinations were made [.] . . . When the plaintiffs' attorneys were exerting what the District Court quite fairly described as "herculean" efforts on their behalf, they expected to have their fee determined under Section 1988. If we apply the Act, those expectations will be foiled. Thus, application of the Act to this case would have the retroactive effect of disappointing reasonable reliance on prior law. That leaves us with the "traditional presumption" against retroactive application . . . It would be "manifestly unjust" to upset [plaintiffs'] reasonable expectations and impose new guidelines at this late date." *Id.* at 1202.

[15] The Ninth Circuit in *Madrid v. Gomez, supra* concurred in finding that the relevant date for measuring expectations is "the moment when counsel agreed to take the case." 150 F.3d at 1039. The court concludes, however, that expectations of recovery at that time are too uncertain; failing to recognize that it is the knowledge that compensation will be at a fair market rate, that allows an attorney to accept the uncertainty of prevailing in deciding to take a case. However the *Glover* case, where current counsel did not enter the case until after judgment and an order providing that Plaintiffs were entitled to all reasonable post-judgment monitoring fees at market rate was entered, expectations at the relevant moment were clearly settled.

Court for the Southern Dist. of Iowa, 490 U.S. 296, 316 (1989) (Stevens, J., Marshall, J., Blackmun, J., and O'Connor, J., dissenting) (citing *Ohntrup v. Firearms Center, Inc.*, 802 F.2d 676 (3rd Cir. 1986) and *Mekdeci ex rel. Mekdeci v. Merrell National Laboratories*, 711 F.2d 1510, 1521-22 (11th Cir. 1983)).

Given these considerations, and the fact that Plaintiffs did not have "fair notice" that attorney fees would no longer be based upon prevailing market rate but rather a radically lower rate, the provisions would have "retroactive effect" if applied to the present cases. To apply new fee restrictions without Plaintiffs' counsel having any real opportunity to alter their prior commitment to representation would be manifestly unjust.

II. ANY CONFLICT BETWEEN THE REASONING OF THE CIRCUITS ON THIS ISSUE HAS BEEN RESOLVED BY THIS COURT'S SUBSEQUENT OPINIONS

Defendants urge review of the Sixth Circuit's opinion to resolve a conflict among the circuits. The differences in the reasonings of the circuit opinions which have addressed the retroactive application of the PLRA's fee provisions do not warrant a grant of certiorari in this case.

Defendants argue that the Sixth Circuit's opinion stands alone in opposition to three circuit decisions holding that the PLRA's fee limitations apply to cases pending on the date of its enactment. Defendants' Petition pp. 8-9 referencing *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 869 (1918); *Madrid v.*

Gomez, 150 F.3d 1030 (9th Cir. 1998), *reh'g pet. filed* and *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997).

Defendants however fail to advise this Court that the *Williams* holding, issued as a two-page order, was rejected by a subsequent decision of the Eighth Circuit holding that the PLRA's fee provisions do not apply to pending cases. *Weaver v. Clarke*, 120 F.3d 852 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 898 (1998) (relying upon *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996)). Defendants also fail to note that *Alexander S.* was decided prior to, and without the benefit of this Court's treatment of the retroactivity issue in *Lindh v. Murphy, supra*.

The only circuit decision which was decided after *Lindh* is the Ninth Circuit's opinion in *Madrid*. However as Plaintiffs have requested rehearing, asserting that the panel's holding in *Madrid* conflicts with the retroactivity analysis of a prior en banc decision of the circuit in *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997), and the court has ordered briefing on these issues, the final outcome of this decision remains uncertain.

The only final circuit decisions, issued after *Lindh*, that address the PLRA's applicability to post-enactment attorney fees is the Sixth Circuit case at issue and the Second Circuit's opinion in *Blissett v. Casey*, 147 F.3d 218 (2nd Cir. 1998). Both of these decisions properly apply *Lindh's* rulings to the attorney fee provisions of the PLRA in holding that the fee provisions do not apply retroactively to limit Plaintiffs' attorney fees in pending cases. There exists no conflict for the court to resolve where the only final circuit decisions, *Blissett* and *Hadix*, which analyzed the statute's provision pursuant to this Court's

rulings in *Lindh* are both consistent and correctly apply this Court's rulings.

There is also no conflict on the question of whether the Act's limitations apply retroactively to limit attorney fees for services performed prior to the effective date of the Act and "awarded" subsequent to the Act's passage.[16]

Courts have been nearly uniform in holding that Section 803(d) does not apply to "awards" of attorney fees for services performed prior to the passage of the Act, finding that the statutory language does not evince clear Congressional intent as to its temporal reach and application of the Act to pre-passage services would constitute an impermissible retroactive application. *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996); *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998).[17] In light of the uniformity in decisions

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[16] While Defendants' Petition states that they "do not dispute Respondents' counsel's entitlement to be paid for pre-PLRA work under pre-PLRA standards," elsewhere in their Petition Defendants argue that the attorney fee limitations of Section 803(d) of the PLRA should apply to any post-enactment award in any action brought by a prisoner regardless of when the work was completed. Petitioners' Brief, pp. 10-11, 21.

[17] In addition, nearly every district court which has considered the question has found the PLRA's attorney fee provision inapplicable to pre-passage work. *Blissett v. Casey*, 969 F. Supp. 118 (N.D.N.Y. 1997) (refusing to apply restrictions to attorneys fees earned after PLRA went into effect when case was pending on effective date); *Hadix v. Johnson*, 965 F. Supp. 996 (W.D. Mich. 1997) (same). There are also a number of unreported district court opinions refusing to apply the PLRA fees restrictions in cases that were pending when the Act became effective. *Tragale v. Scheel*, No. CV-N-93-672-DWH (D. Nev. May 21, 1997); *Browning v. Vernon*, No. Civ. 91-0409-5 BLW (D. Idaho March 7, 1997); *Coleman v. Wilson*, No. Civ. 5-90-0520 LKK JFM (E.D. Cal. Jan 21, 1997); *Perrier v. City of Albuquerque*, No. Civ. 95-943 RLP/WWD (D.N.M. Dec. 17, 1996); *Miller-Bey v. Stiller*, No. 93-CV-72111, 1997, U.S. Dist. LEXIS 8524 (E.D. Mich. Feb. 25, 1997).

and this Court's recent decision on statutory retroactivity, a grant of certiorari is not warranted in this case.

CONCLUSION

The Sixth Circuit Court of Appeals correctly held that the attorney fee provisions of the PLRA are inapplicable to these post-judgment cases which were pending prior to the effective date of the Act.

RELIEF SOUGHT

WHEREFORE, Plaintiffs-Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

DEBORAH LABELLE
(Counsel of Record)
221 North Main Street
Ann Arbor, MI 48104

October 16, 1998

(3)

No. 98-262
In the Supreme Court of the United States
October Term, 1998

PERRY JOHNSON, et al,

Petitioners,

v.

EVERETT HADIX, et al,

Respondents.

PERRY JOHNSON, et al,

Petitioners,

v.

MARY GLOVER, et al,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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9pp

QUESTION PRESENTED FOR REVIEW

Whether the attorney fee provision of the Prison Litigation Reform Act, PLRA § 803, 42 USC § 1997e(d), applies to fees for services in litigation pending on the effective date of the PLRA.

PARTIES TO THE PROCEEDING

The parties are designated within the Petition for Writ of Certiorari.

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JURISDICTION

Petitioners adopt the jurisdictional statement set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners adopt the statement of the case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL CONCERNING THE APPLICATION OF PLRA § 803 TO ATTORNEY FEES EARNED FOR SERVICES PERFORMED IN LITIGATION PENDING ON THE DATE OF ITS ENACTMENT.

Pursuant to Rule 15.8, Petitioners wish to apprise the Court of the following new case and other intervening matters not available at the time of the filing of their Petition for Writ of Certiorari.

In *Casey v. Blissett*, No. 98-257, twenty-eight (28) states, including the State of Michigan, have filed a joint amicus curiae brief in support of petitioner (the State of New York) seeking review of the decision of the Second Circuit Court of Appeals. As in the case at bar, *Casey v. Blissett* concerns the applicability of the Prison Litigation Reform Act's, P.L. 104-134, 110 Stat. 321 (PLRA), limits on attorneys' fees to cases pending on the date of enactment. Both the instant matter and New York's petition merit review by this Court to resolve and acknowledge the split between the circuits, and to address the important federal question raised in the cases. The circuits are sharply divided on whether 42 U.S.C. § 1997e(d) applies to fees for services in litigation pending on the effective date of the PLRA. Because of the great stakes involved, Petitioners need a clear resolution of the issue at bar.

On October 30, 1998, the United States Court of Appeals for the District of Columbia issued its Opinion in *Inmates of*

D.C. Jail v. Jackson, 1998 WL 754391 (D.C. Cir. 1998), and addressed the issue of whether the attorneys' fee provision of the PLRA applies to fees earned for work performed after the effective date of the Act if the litigation began before its enactment. The Court held that the attorney fee provisions of the PLRA apply to work done after the effective date of the PLRA, even if the case was filed before the effective date of the Act. The Court specifically rejected the position adopted by the Sixth Circuit Court of Appeals in *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998), the instant case, in which Petitioners are seeking review by this Court.

The Court of Appeals for the District of Columbia Circuit held in pertinent part:

> We do not find in the statute the plain meaning urged by the prisoners. There is simply nothing in the phrase "any action" that implies, let alone compels, a holding that the statute applies only to actions brought after the passage of the Act. Nor does the language compel resort to legislative history in an attempt to clarify its meaning. We are also not convinced that there is a negative inference to be drawn from a comparison of Sections 802 and 803 of the PLRA. Section 802 of the PLRA amends an entirely different statutory section, 18 U.S.C. § 3626. It is unsurprising that Congress would use differing language to amend different statutory provisions, and the absence of the Section 803 language simply will not bear the burden urged by the inmates. If this case involved a genuine question of retroactivity, that is, if the District were seeking to apply the cap to hours worked before the effective date of the statute, we might find the omission more compelling. But the District advances no such argument, and we join the Eighth Circuit in holding that retroactivity concerns are not implicated when the statute is applied to work performed after April 26, 1996, the date of passage of the PLRA. See *Williams v. Brimeyer*, 122 F.3d 1093, 1094 (8th Cir. 1997).
>
> When it is applied to work performed after the effective date of the Act, the PLRA raises none of the retroactivity concerns that require the analysis used by

> the district court because the statute creates present and future effects on present and future conduct, and has no effect on past conduct. Compare *Jensen*, 94 F.3d at 1203 (holding that the PLRA did not apply to pre-act work) with *Williams*, 122 F.3d at 1094 (holding that as applied to work performed after the passage of the Act, there is no retroactivity). The fees at issue were earned after the PLRA passed. The PLRA does not in this case upset vested interest because no right to a fee existed until the work was done. Because we find no retroactive effect, we need not consider the Supreme Court's extensive analysis of when to permit retroactive application. (citations omitted).

Id. at *3-4.

The Court of Appeals for the District of Columbia Circuit joins the Fourth, Eighth and Ninth Circuit Courts of Appeals which have held that the PLRA's attorney fee provisions apply to legal fees earned in actions pending on the date of enactment.

CONCLUSION

For the aforementioned reasons, and those previously set forth within their Petition for Writ of Certiorari, Petitioners respectfully urge this Court to grant certiorari and reverse the Court of Appeals.

Respectfully submitted,

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November, 1988

(9)

No. 98-262
In the Supreme Court of the United States
October Term, 1998

KENNETH L. McGINNIS, et al,

Petitioners,

v.

EVERETT HADIX, et al,

Respondents.

On Writ of Certiorari To The United States
Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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Petition for Certiorari filed August 6, 1998
Certiorari granted November 16, 1998

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II. Judgments Under Review

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(Reproduced at App. to Pet. 1a)

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EVERETT HADIX, et al,

Plaintiffs

v.

PERRY JOHNSON, et al,

Defendants

_____/

THE UNITED STATES DISTRICT COURT OF THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
NO. 80-73581

SELECTED DOCKET ENTRIES

Sept 18, 1980	2	Complaint filed, no summons issued. DD 9/18/90
Sept 24, 1986	353	MAGISTRATE'S Special Master Report and Recommendation with appendix. (see report)
11/19/87	773	ORDER by Judge John Feikens, regarding monitoring fees (Copy of order that was originally omitted from docket) (lh) [Entry date 02/05/91]
4/24/92	831	AMENDED STIPULATION and order by Judge John Feikens regarding attorney fees and costs. (1052) [Entry date 4/28/92]
6/14/93	926	MEMORANDUM opinion and order by Judge John Feikens granting petition by Neal Bush, Michael J. Barnhart, Deborah A. LaBelle, Patricia A. Streeter for attorney fees and costs [906-1] and awarding Mr. Barnhart $8,370.50, Ms. Streeter $734.69, Ms.

		LaBelle $10,929.00 and Mr. Bush $13,343.80 with appendix and proof of mailing (1076) [Entry date 06/15/93]
5/30/96	1067	ORDER by Judge John Feikens granting motion for attorney fees by plaintiffs [1052-1] (1074) [Entry date 06/04/96]
9/13/96	1122	MOTION by plaintiffs for attorneys fees with brief and exhibits (1172) [Entry date 09/16/96]
10/10/96	1132	RESPONSE by defendants' to motion for attorney fees by plaintiffs [1122-1] with proof of service (1074) [Entry date 10/17/96]
10/25/96	1134	REPLY by plaintiff to response to motion for attorney fees by plaintiffs [1122-1] with attachment and proof of mailing (1172) [Entry date 10/28/96]
12/4/96	1146	ORDER by Judge John Feikens that the PLRA's limits on attorney fees apply to this case for work performed after the PLRA's enactment on 4/26/96; the plaintiffs re-submit fee requests for work performed between 1/1/96 and 6/30/96 in which counsel's fees are limited to $112.50 per hour for time worked after 4/26/96; upon receiving the revised request defendants pay plaintiffs counsel for the contested 23 hours' work provided (RH) [Entry date 12/05/96]
12/20/96	1151	APPEAL by defendant of order [1146-1] to USCA - FEE: paid (no receipt number given) (pr) [Entry date 12/23/96]

12/20/96	1154	CROSS-APPEAL by plaintiffs of order [1146-1] to USCA FEE: paid Receipt #: 21374 (pr) [Entry date 12/23/96]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-2567
Nsuit: 3550 Prisoner: Civil Rights
Hadix v. Johnson
Appeal from: Eastern District of Michigan at Detroit

- -

Case type information:
1) prisoner petition
2) state
3) prisoner civil rights

- -

Lower court information:

District: 0645-2 : 80-73581
Trial Judge: John Feikens
Court Reporter: Elnora Williams
Court Reporter: Karin Dains
Date Filed: 9/18/80
Date order/judgment: 12/5/96
Date NOA filed: 12/20/96

- -

Fee status: paid

- -

Prior cases:
88-1879
Date filed: **/**/** Date disposed: **/**/** Disposition:

Current cases:

	Lead	Member	Start	End
Consolidated:				
	96- 2567	97- 1272	12/15/97	
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	96- 2567	96- 2588	12/15/97	
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	96- 2567	96- 2568	1/2/97	
	96- 2586	96- 2588	12/31/96	
Related:				
	96- 2567	96- 2582	12/31/96	4/8/98

EVERETT HADIX; et al (96-2567) Plaintiffs - Appellees/Cross-Appellants
v.
PERRY M. JOHNSON; et al (96-2568) Defendants - Appellants/Cross-Appellees.

12/30/96	Prisoner Case Docketed . Notice filed by Appellant Perry M. Johnson. Transcript needed: n (PLRA's limits on attorney fees) (ert) [96-2567]
***	
12/11/97	CAUSE ARGUED on 12/11/97 by Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson in 96-2567, Deborah A. LaBelle for Appellee Cross-Appellant Everett Hadix in 96-2567 before Judges Kennedy, Jones, Suhrheinrich. [96-2567] (paw) [96-2567]
***	
12/16/97	RULING to consolidate for submission the following cases: 96-2567/2568;96-2586/2588; 97-1272. [96-2567] . (ert) [96-2567]
***	
4/17/98	OPINION filed : AFFIRMED in part REVERSED in part and remanded [96-2567, 96-2568, 96-2586, 96-2588, 97-1272] (remanded for a recalculation of the fee awards in a manner consistent with the opinion of the court); appeal 97-1218 is DISMISSED as moot; decision for publication pursuant to local rule 24 [96-2567, 96-2568, 96-2586, 96-2588, 97-1272, 97-1218] Cornelia G. Kennedy, Circuit Judge, AUTHOR; Nathaniel R. Jones, Circuit Judge; Richard F. Suhrheinrich, Circuit Judge. (ert) [96-2567 96-2568 96-2586 96-2588 97-1272]

4/21/98	JUDGMENT: AFFIRMED in part REVERSED in part and remanded appeal 97-1218 is DISMISSED as moot. (ert) [96-2567 96-2568 96-2586 96-2588 97-1272]
4/22/98	Appellant MOTION filed to extend time to file petition for rehearing until 5/15/98 . . Motion filed by Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson in 96-2567, Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson in 96-2568, Leo H. Friedman for Appellant Cross-Appellee Perry Johnson in 96-2586, Leo H. Friedman for Appellant Cross-Appellee Perry Johnson in 96-2588. Certificate of service date 4/21/98 [96-2567, 96-2568, 96-2586, 96-2588] (ert) [96-2567 96-2568 96-2586 96-2588]
4/22/98	LETTER SENT by supv granting motion to extend time to file petition for rehearing [1715012-1] filed by Leo H. Friedman, Petition due 5/15/98 for Leo H. Friedman in 96-2567 [96-2567, 96-2568, 96-2586, 96-2588] (ert) [96-2567 96-2568 96-2586 96-2588]

* * *

5/14/98	PETITION for en banc rehearing filed by Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson . Certificate of service date 5/14/98. [96-2567, 96-2568, 96-2586, 96-2588] (blh) [96-2567 96-2568 96-2586 96-2588]
6/18/98	ORDER filed denying petition for en banc rehearing [1729966-1] filed by Leo H. Friedman [96-2567, 96-2568, 96-2586, 96-2588]. Cornelia G. Kennedy, Nathaniel R. Jones, Richard F. Suhrheinrich, Circuit Judges. (blh)

* * *

8/7/98	Appellant LETTER filed regarding Petition for Writ of Certiorari was filed in Supreme Court on 8/6/98. [96-2567, 96-2568, 96-2586, 96-2588, 97-1272] . Letter from Leo H. Friedman for Appellant Cross-Appellee Perry M. Johnson in 96-2567 . Certificate of service date 8/6/98 [96-2567, 96-2568, 96-2586, 96-2588, 97-1272] (ert) [96-2567 96-2568 96-2586 96-2588 97-1272]
8/24/98	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Cross-Appellee Perry M. Johnson in 96-2567, Appellant Cross-Appellee Perry M. Johnson in 96-2568, Appellant Cross-Appellee Perry Johnson in 96-2586, Appellant Cross-Appellee Perry Johnson in 96-2588, Appellant Perry Johnson in 97-1272 . Filed in the Supreme Court on 08-11-98 , Supreme Ct. case number: 98-262 . [96-2567, 96-2568, 96-2586, 96-2588, 97-1272] (swh) [96-2567 96-2568 96-2588 97-1272]
11/19/98	U.S. Supreme Court letter filed granting petition for writ of certiorari, limited to two questions, [1789040-1] filed by Perry M. Johnson, Perry M. Johnson, Perry Johnson, Perry Johnson, Perry Johnson [96-2567] . Filed in the Supreme Court on 11-16-98 . (swh) [96-2567]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-2568
Nsuit: 3550 Prisoner: Civil Rights
Hadix v. Johnson
Appeal from: Eastern District of Michigan at Detroit

EVERETT HADIX; et al (96-2567) Plaintiffs -
v.
PERRY M. JOHNSON; et al (96-2568) Defendants -
Appellants/Cross-Appellees.

12/30/96 Prisoner Case Docketed . Notice filed by Appellee Cross-Appellant Everett Hadix. Transcript needed: n (PRLA's limits on attorney fees apply to this case for work performed after the PLRA's enactment). (ert) [96-2568]

[Thereafter all relevant proceedings and docket entries are the same as in consolidated case docket No. 96-2567.

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-1851
Nsuit: 3550 Prisoner: Civil Rights
Hadix v. Johnson
Appeal from: Eastern District of Michigan at Detroit

Case type information:
1) prisoner petition
2) state
3) prisoner civil rights

Lower court information:

District: 0645-2 : 80-73581
Court Reporter: Lynn Spietz
Trial Judge: John Feikens
Court Reporter: Elnora Williams
Date Filed: 9/18/80
Date order/judgment: 6/4/96
Date NOA filed: 6/13/96

Fee status: paid

Prior cases:
None
Current cases:

	Lead	Member	Start	End
Consolidated:				
	96- 1907	96- 1908	6/16/98	
	96- 1907	96- 1943	6/16/98	
Related:				
	96- 1851	96- 1907	9/30/96	
	96- 1851	96- 1908	9/30/96	
	96- 1851	96- 1943	9/30/96	

EVERETT HADIX,Plaintiff - Appellee
v.

PERRY JOHNSON, Defendant - Appellant FTS 335-7157
***

5/20/98	OPINION filed:Orders holding the pre-1997 automatic stay provision unconstitutional are REVERSED; the 5/30/96 award of attorney fees entered in the Hadix litigation by Judge Feikens and Judge Enslen's decision to retain jurisdiction over the security classification system at the MI Reformatory are AFFIRMED; the case is REMANDED for further proceedings. [96-1851, 96-1907, 96-1908, 96-1943], decision for publication pursuant to local rule 24 [96-1851, 96-1907, 96-1908, 96-1943] Circuit Judges Boyce F. Martin Jr., Chief Judge; Alan E. Norris, sep con/dis; Karen N. Moore, Authoring. (ert)
5/20/98	JUDGMENT: REVERSED in part; AFFIRMED in part and remanded for further proceedings consistent with the opinion. (ert)
6/11/98	MANDATE ISSUED with no cost taxed [96-1851] (eim)

Docket as of September 17, 1998 9:32 pm

MARY GLOVER, et al,

Plaintiffs

v

PERRY JOHNSON, et al,

Defendants

_____/

THE DISTRICT COURT OF THE
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION
NO. 77-71229

SELECTED DOCKET ENTRIES

May 19, 1977	1	Complaint filed, Summons issued.
Oct 3, 1977	19	Pltf's Amended Complaint with proof of service. DD 10-4-77
Oct 10, 1979	104	Opinion that an Order will be issued granting Pltfs declaratory and injunctive relief in accordance with the terms of this opinion. DD 10-19-79 Feikens J
Apr 6, 1981	153	Final order, re: that the rehabilitation opportunities available to the state's women prisoners were substantially inferior to those available to the state's male prisoners, ect. (see order) DD 4-10-81 Feikens J
Feb 3, 1982	164	OPINION Granting Award of Attorney Fees, Feikens, J. dd 2/4/82
May 10, 1985	201	STIP. and Order regarding attorney fees. Feikens, J. cdo

Jul 2, 1985	206	APPEARANCE of attorneys Deborah LaBelle for pltfs., w/proof of service. cdo
Nov 7, 1985	216	ORDER granting pltfs' motion for system for submission of attorney fees, requests for fees shall be submitted to opposing counsel every six months, defts will have 28 days to contest the amount.
Jul 30, 1987	386	MEMORANDUM opinion and order that Charlene Snow recover from defts and hourly rate of $115.00 for 235.17 hours ($277,044.55) and and $942.38 in costs for a total of $27,986.93. Deborah LaBelle recover from defts $115.00 per hr for $210.82 hours ($24,244.30) and $1,535.04 in costs for a total of $25,779.34. FEIKENS J
11/27/89	541	MEMORANDUM opinion and order by Judge John Feikens granting motion by Charlene M. Snow for attorney fees [503-1], granting Deborah LaBelle's attorney fees, and granting plaintiffs' counsel their combined costs for January through June of 1989, with proof of mailing (SB) [Entry date 11/28/89]
12/11/89	543	APPEAL by defendants of order [541-1] to USCA - FEE: PAID - Receipt #: 248610 (1B) [Entry date 12/13/89]
5/22/90	581	MEMORANDUM opinion and order by Judge John Feikens granting motion for attorney (settlement) fees by Mary Glover [523-1] and granting motion for costs by Mary Glover. And that plaintiffs motion regarding fees for worked performed on behalf of Fair and

		Alcorta is granted with proof of mailing. See order for details. [523-2] (1h) [Entry date 05/24/90]
12/17/92	766	OPINION and order by Judge John Feikens granting in part and denying in part motion by Deborah A. LaBelle and Martin A. Geer for settlement of attorney fees and costs by plaintiff [756-1] (1179)
8/4/94	946	NOTICE by plaintiffs of substitution of attorney Michael J. Barnhart for plaintiffs Mary Glover, Lynda Gates, Jimmie Ann Brown, Mannette Gant, for Jacalyn M Settles for attorney Martin Geer with appearance and proof of mailing (1087) [Entry date 08/10/94]
3/11/96	1108	MOTION by plaintiffs for settlement of attorney fees and costs for the time period of 7/1/95 through 12/31/95 with brief, exhibits, proof of mailing, notice of hearing, and proposed order (1092) [Entry date 03/12/96]
5/30/96	1164	OPINION and order by Judge John Feikens regarding attorney fees for the period of 7/1/95 thru 12/31/95 (see order for details) (1054) [Entry date 06/03/96]
6/13/96	1173	APPEAL by defendants of order 1164-1] to USCA - FEE: PAID - Receipt #: 329487 (1044) [Entry Date 06/24/96]
12/4/1996	1219	MEMORANDUM opinion and order by Judge John Feikens granting motion for settlement of attorney fees and costs for the time period of 1/1/96 through 6/30/96 by Mary Glover, Lynda Gates, Jimmie Ann Brown, Mannette

		Gant, Jacalyn M. Settles [1209-1] with proof of mailing (lt) [Entry date 12/5/96]
12/17/96	1222	APPEAL by defendants of order [1219-1) to USCA - FEE: paid - Receipt #: 337348 (pr) [Entry date 12/23/96]
12/24/96	1228	CROSS-APPEAL by plaintiffs of order [1219-1] to USCA FEE: paid Receipt #: 337570 (pr) [Entry date 12/30/98]
2/6/97	1242	OPINION and order by Judge John Feikens DENYING motion for reconsideration and clarification of opinion order dated 12/4/96 regarding fees [1219-1] by Lynda Gates, Jimmie Ann Brown, Mannette Gant, Jacalyn M. Settles, Mary Glover [1231-1], DENYING motion for evidentiary hearing by Lynda Gates, Jimmie Ann Brown, Mannette Gant, Jacalyn M. Settles, Mary Glover [1231-2] with proof of mailing (bk) [Entry date 02/07/97]
2/6/97	1244	OPINION and order by Judge John Feikens GRANTING motion for settlement of post-judgment appellate fees and costs by Mary Glover, Lynda Gates, Mannette Gant, Jimmie Ann Brown, Jacalyn M. Settles [1218-1] with proof of mailing (bk) [Entry date 02/07/97]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-2586
Glover v. Johnson
Appeal from: Eastern District of Michigan at Detroit

- -

MARY GLOVER; et al (96-2588) Plaintiffs - Appellees/Cross-Appellants
v.
PERRY JOHNSON; et al (96-2586) Defendants - Appellants/Cross-Appellees

12/31/96	Prisoner Case Docketed . Notice filed by Appellant Cross-Appellee Perry Johnson. Transcript needed: y (ert) [96-2586]

[Thereafter all relevant proceedings and docket entries are the same as in consolidated case docket No. 96-2567.]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-2588
Glover v. Johnson
Appeal from: Eastern District of Michigan at Detroit

- -

MARY GLOVER; et al (96-2588) Plaintiffs - Appellees/Cross-Appellants

v

PERRY JOHNSON; et al (96-2586) Defendants - Appellants/Cross-Appellees

12/31/96	Prisoner Case Docketed . Notice filed by Appellee Cross-Appellant Mary Glover. Transcript needed: y (ert) [96-2588]

[Thereafter all relevant proceedings and docket entries are the same as in consolidated case docket No. 96-2567.]

GENERAL DOCKET FOR Sixth Circuit Court of Appeals

Court of Appeals Docket #: 96-1852
Glover v. Johnson
Appeal from: Eastern District of Michigan at Detroit

- -

MARY GLOVER; et al Plaintiffs - Appellees
v.
PERRY JOHNSON, Director; et al, Defendants - Appellants

6/28/96	Prisoner Case Docketed. Notice filed by Appellant Perry Johnson; et al, Transcript needed: n (attorney fees) (ert) [96-1852]
• • •	
3/13/97	CAUSE ARGUED on 3/13/97 by Lisa C. Ward for Appellant Perry Johnson in 96-1852, Deborah A. LaBelle for Appellee Mary Glover in 96-1852 before Judges Wellford, Ryan, Daughtrey. [96-1852] (paw) [96-1852]
• • •	
3/2/98	OPINION filed: dc judgment denying motion to terminate continuing district court jurisdiction (95-1521) is VACATED and the case is REMANDED for further proceedings with jurisdiction retained[95-1521]; dc judgment finding the defts in contempt of court and imposing sanctions (96-1931) and the dc judgment awarding attorney fees (96-1852 and 96-1948) is AFFIRMED in part REVERSED in part and remanded [95-1521, 96-1852, 96-1931, 96-1948], decision for publication pursuant to local rule 24 [95-1521, 96-1852, 96-1931, 96-1948]. Harry W. Wellford,Circuit Judge,separate con/dis.; James L. Ryan, Circuit Judge-AUTHORING; Martha C. Daughtrey, Circuit Judge. (ert) [96-1852 96-1931 96-1948]

3/2/98 JUDGMENT:dc judgment in VACATED and the case is REMANDED with jurisdiction retained (95-1521); AFFIRMED in part REVERSED in part and remanded for further proceedings (96-1852, 96-1931, 96-1948) . (ert) [96-1852 96-1931 96-1948]

3/10/98 CERTIFIED RECORD RETURNED for use by district court Volumes included: 9 Pl; 6 Tr; 1 Dep;. To be returned to 6CA by 4/13/98 in 95-1521, in 96-1852, in 96-1931, in 96-1948 . [95-1521, 96-1852, 96-1931, 96-1948] (rgf) [95-1521 96-1852 96-1931 96-1948]

3/24/98 MANDATE ISSUED with no cost taxed [96-1852, 96-1948] (eim) [96-1852 96-1948]

6/26/98 CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [96-1852] . Volumes included: 9 Pl; 6 Tr; 1 Dep;. (rgf) [96-1852]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al.,

Plaintiffs,

vs. No. 80-CV-73581-DT

PERRY JOHNSON, et al., HONORABLE JOHN FEIKENS
MAGISTRATE STEVEN D. PEPE

Defendants.
_____/

MAGISTRATE'S SPECIAL MASTER REPORT AND RECOMMENDATION

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, *et al.*,

Plaintiffs,

vs.

No. 80-CV-73581-DT
HONORABLE JOHN FEIKENS
MAGISTRATE STEVEN D. PEPE

PERRY JOHNSON, *et al.*,

Defendants.
_____/

MAGISTRATE'S SPECIAL MASTER

REPORT AND RECOMMENDATION

Plaintiffs brought a class action challenge to the conditions of confinement of the inmates incarcerated at Central Complex of the State Prison at Southern Michigan (SPSM-CC), including the Reception and Guidance Center. This suit was initiated September 18, 1980. At the final pretrial conference on January 28, 1983, defendants indicated they would not contest liability and were willing to negotiate terms of an appropriate remedy. A Consent Judgment was entered on May 13, 1985, resolving many of the areas involved in the plaintiffs' First Amended Complaint.

Plaintiffs' counsel have petitioned the Court for attorney's fees and Costs under 42 U.S.C. § 1988. Plaintiffs asserted their right to such fees and Costs in the prayer for relief of their First Amended Complaint. The petitions involve extensive itemizations of billable hours for five attorneys as well as Prison Legal Services. Defense counsel filed objections challenging first whether the plaintiffs had waived attorney's fees in the consent decree, thus precluding an award, or in the alternative whether they were prevailing parties within the meaning of 42 U.S.C. § 1988. This Court, by Memorandum Opinion and Order of February 6, 1986, ruled against the defendants on these two issues.

By Order of Reference dated February 18, 1986, this matter was referred to the undersigned for a Special Master's report on appropriate attorney's fees and costs, including: (1) hundreds of hours challenged as being inadequately described or documented; (2) hours for attorney services for plaintiffs that were allegedly duplicative, excessive in time or dealt with unresolved or unsuccessful issues; (3) the appropriate hourly rates for each of the five petitioners; and finally (4) whether the rates should be adjusted by some multiplier. The Order of Reference specifically noted that the Special Master's report need not be accompanied by a transcript of the proceedings. In lieu thereof, the undersigned has prepared a detailed appendix summarizing the testimony taken with regard to this fee petition. It is hoped that the extensive summary of the testimony may serve as the factual background for consideration of the findings and recommendations and will preclude the necessity of either side having to have transcribed the extensive hearings in this matter either for review by the district court judge or the appellate court. This effort does not preclude either side from obtaining a transcript to challenge either the summary of the evidence or the ultimate findings and recommendation.

While the Court has made an initial determination that the plaintiff's have succeeded on significant issues in litigation in order to qualify as prevailing parties, the issue of the degree of success, as noted in the summary of the law that follows, must be considered again both with respect to which of those itemized hours were to be included in the attorney's fees calculation, as well as whether there should be an adjustment of the attorney's fees upward or downward due to the degree of success. As noted below, a limited stipulation has been agreed to by counsel dealing with hours inadequately described, duplication of effort among plaintiffs' counsel, work performed on unsuccessful and unresolved issues, and work for which there were no contemporaneous time records.

The defendants' challenge to the fee request argued that the limited degree of success should defeat both plaintiffs' being considered prevailing parties as well as any claim for an enhancement of the fee award. Defense counsel in the pleadings did not specifically argue that other than by the

exclusion of certain hours, this Court should diminish the fees awarded due to the alleged limited degree of success achieved. It became clear during the presentations of the evidence and arguments during the hearings undertaken in this matter, that defense counsel sought to argue that the alleged limited degree of success should not only defeat prevailing party status or any enhancement that the plaintiffs asserted, but it should also be considered to diminish any fee award beyond the mere exclusion of certain hours spent on unsuccessful or unresolved issues. Since it is ultimately for the Court to determine what is a reasonable fee under 42 U.S.C. § 1988, any deficiencies in defense counsels' pleadings should not preclude their being able to argue this issue. For purposes of this report, the undersigned has considered the defendants' arguments that the limited degree of success should not only preclude enhancement but should result in a diminution of the attorney's fees awarded in addition to the mere exclusion of certain hours that plaintiffs' counsel spent on unsuccessful issues. Conceptually, hours spent on unsuccessful issues are different from hours spent on successful issues of little significance. In arriving at a reasonable fee, separate reductions might be appropriate for each of these considerations.

This report shall be organized into four sections: I. Summary Chronology of the *Hadix* Litigation; II. The Legal Standard for Fee Awards; III. Findings of Fact; and IV. Recommendations. Appendix A summarizes the evidence presented in the fee petition hearings; Appendix B is a Stipulation and Order Regarding Attorney Fees; and Appendix C. is a List of Exhibits.

I. SUMMARY CHRONOLOGY OF THE HADIX LITIGATION[1]

[Dates in this chronology are primarily from this Court's docket sheet.]

September 18, 1980--plaintiffs' *pro se* complaint is filed.

October 30, 1980	--	Magistrate Paul Komives contacts Larry Bennett and Zolton Ferency regarding their being involved as counsel for the plaintiffs. They are formally appointed December 6, 1980.
January 7, 1981	--	defendants file a motion to dismiss or in the alternative motion for summary judgment.
March 23, 1981	--	plaintiffs file a motion for class certification.
May 8, 1981	--	Thomas Loeb files his appearance as co-counsel for the plaintiffs.

[1] For purposes of brevity, the summary of the case presented here is solely a chronological sequence of events. Defendants have made a statement of facts in their January 2, 1986, Motion for Summary Judgment (pp. 3-9) on the fee petition. Petitioners in their January 8, 1986, Brief In Response to Defendants' Motion for Sumnary Judgment (pp. 3-17) prepared under the direction of lead counsel, Larry Bennett, have presented a somewhat more elaborate narrative of the history of this case. The summary of evidence in the Appendix is drawn from these submissions as well as the testimony of petitioner Bennett who testified on the history of the litigation. Defense counsel was asked to indicate which areas of the plaintiffs' Statement of Proceedings (pp. 3-17 noted above) on the history of the case the defendants agreed with and what areas of the submission they felt were mischaracterizations of facts.

On June 6, 1986, defense counsel submitted its statement of facts and a copy of the petitioners' Statement of Proceedings with certain portions deleted. Other than certain differing characterizations about various proceedings affecting this matter and characterizations concerning the process of negotiating the consent decree, there is substantial agreement upon the case history facts.

May 13, 1981	--	Judith Magid files her appearance as co-counsel for the plaintiffs.
June 23, 1981	--	the defendants' motion to dismiss is granted with respect to the Michigan Department of Corrections and Governor Milliken being dismissed as defendants. Certain paragraphs of the complaint are stricken, but otherwise the motion to dismiss and/or for summary judgment is denied.
August 24, 1981	--	plaintiffs' counsel requests permission to enter SPSM-CC for inspection.
August 24, 1981	--	the Court grants plaintiffs' motion to certify the case as a class action.
September 9, 1981	--	plaintiffs' file motion for order permitting entry into SPSM-CC for inspection and other purposes.
September 22, 1981	--	plaintiffs file interrogatories.
September 23, 1981	--	order grants entry into SPSM-CC for inspection and other purposes.
September 30, 1981	--	defendants answer plaintiffs' complaint.
October 2, 1981	--	defendants file their second motion to dismiss or in the alternative summary judgment.
October 2-3, 1981	--	plaintiffs' expert, Dr. David

October 2-3, 1981 -- plaintiffs' expert, Dr. David Fogel, tours SPSM-CC.

December 18, 1981 -- Brian MacKenzie replaces J. Peter Lark as defense counsel.

December 22, 1981 -- plaintiffs file a petition for a preliminary injunction to preserve the availability of Prison Legal Services.

December 24, 1981 -- defendants submit their first interrogatories to the plaintiffs.

January 15, 1982 -- the preliminary injunction is granted preserving Prison Legal Services.

February 3, 1982 -- defendants appeal the preliminary injunction order.

Extensive discovery is undertaken in 1982, including various discovery motions. Defendants' second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and eleventh sets of discovery documents were filed respectively on March 25, March 31, April 15, May 3, June 14, August 20, August 27, September 1, and September 29, 1982. Plaintiffs file their second set of interrogatories and a documents request on April 26, 1982. Prison tours are conducted for plaintiffs by Dr. Robert Powitz (sanitation); Dr. Brad Fisher (psychological care and classification); and Curtis Pulitzer (architectural design/management); and food service data is made available to plaintiffs' nutritionists, Paula and Michael Zemel. Defense experts touring the facility include Carl Clements and Paul Keve (correctional practices); Ted Gordon (sanitation); Dr. Lloyd Baccus (psychological care); Paul Silver (architecture and management); and Judy Wilson (nutrition).

June, 1982 -- the United States Department of Justice issues its report on the Michigan prison system (The Schoen Report).

August 24, 1982 -- order granting leave to file plaintiffs' first amended complaint. The complaint asserts violations of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution, counterpart provisions of the Michigan Constitution, violations of Michigan state laws and regulations affecting the operations of prisons, as well as a third party complaint under 42 U.S.C. §3750(b), (the Law Enforcement Assistance Act.)

October 28, 1982 -- Elaine Fischhoff enters her appearance as co-counsel for the defendants.

October 29, 1982 -- Assistant Attorney General William Bradford Reynolds writes Governor William Milliken concerning the Michigan prison system.

December 14, 1982 -- Patricia A. Streeter, Deborah LaBelle, and Michael Barnhart enter their appearances as co-counsel for plaintiffs.

December 30, 1982 -- defendants' third motion to dismiss and in the alternative for summary judgment is filed.

January 7, 1983 -- Professor John Patrick Apol enters his appearance as co-counsel for the plaintiffs.

January 13, 1983 -- plaintiffs notice depositions of defendants Johnson and Foltz and plaintiffs' expert witnesses Fisher

plaintiffs' expert witnesses Fisher and Powitz.

January 28, 1983 -- final pre-trial and settlement conference at which the defendants' counsel, MacKenzie, requests an adjournment of trial and indicates a willingness to enter into a negotiated settlement.

February 10, 1983 -- Settlement Negotiation Order No. 1.

March 1, 1983 -- a February 25, 1983, letter from Bennett and Magid requesting an order that the Justice Department Report on Michigan Prisons be provided to plaintiffs' counsel.

April 26, 1983 -- plaintiffs' settlement proposal.

May 4, 1983 -- Settlement Negotiation Order No. 2

May 4, 1983 -- pursuant to a request by the plaintiffs the Department of Justice Report on Michigan Prisons is turned over to the plaintiffs.

July 11, 1983 -- negotiation summary filed.

July 13, 1983 -- pre-trial conference in court. (Representations by defense counsel that the pre-complaint negotiations in *U.S.A. v. Michigan*, Civ. G 84-63 CA (W.D.Mich.), a Justice Department CRIPA action under 42 U.S.C. §1977 (hereinafter "*U.S.A.*"), is on a separate track from the *Hadix* case.

July 14, 1983 -- Thomas Nelson enters his appearance as co-counsel for defendants.

July 18, 1983 -- Scheduling Order:
Phase I - (July 15 - September 15, 1983) settlement negotiations by counsel;
Phase II - (September 15 - October 11, 1983) settlement negotiations with counsel, experts, and the Court;
Phase III - (October 15 - November 15, 1983) discovery on unresolved issues;
Phase IV - trial by December 15, 1983.

July, August and September, 1983 -- negotiations continue

September 29, 1983 -- pre-trial conference with the Court and summary of negotiations.

September, October and November, 1983 -- negotiations continue.

October 20, 1983 -- a Phase II negotiation on prison size and management.

December 15, 1983 -- defense 40 page summary of negotiations.

January 18, 1984 -- *U.S.A. v. Michigan*, G 84-63 CA is filed in the Western District of Michigan and is assigned to Judge Richard A. Enslen.

January 23, 1984 -- order for Attorney General Frank J. Kelley and Department of Corrections Director Perry Johnson to appear at pre-trial conference to explain the relationship, if any, between the proposed consent decree in *U.S.A.* and the *Hadix* negotiations.

February 16, 1984 -- pre-trial conference with Attorney

February 16, 1984 -- pre-trial conference with Attorney General Kelley and Director Perry Johnson who state their intent to continue in good faith negotiations in *Hadix* separate from those in *U.S.A.*

March 1, 1984 -- pre-trial conference.

March 15, 1984 -- pretrial conference, defendants' proposal for a physical layout of SPSM-CC is rejected by the plaintiffs as not addressing the administrative problems nor most of the serious physical problems. This matter is set for Phase IV-- trial.

March 19, 1984 -- defendants' twelfth discovery request.

March 23, 1984 -- arguments before Judge Enslen on *U.S.A.* consent decree and motion of *Hadix* plaintiffs to intervene in *U.S.A.* Judge Enslen requires the *U.S.A.* decree to be redrafted to improve its enforceability.

March 30, 1984 -- plaintiffs' third interrogatories and second request for production of documents.

April 2, 1984 -- defendants' thirteenth discovery request and deposition notices for plaintiffs' experts.

April 10, 1984 -- defendants' Offer of Judgment, including an offer to perform a management study.

May 16, 1984 -- plaintiffs' response to Offer of Judgment and counter offer, including the requirement that the

including the requirement that the results of any management study be implemented.

June 8, 1984 -- a meeting regarding management, fire safety, access, and ventilation. Negotiations on plaintiffs' input on management study, staff composition and implementation.

June 14, 1984 -- status report with the Court [from Bennett time sheet]

June 22, 1984 -- Streeter and Magid appear before Judge Richard Enslen regarding acceptance of the amended *U.S.A.* Consent Judgment. Streeter tells Judge Enslen that they had met with defense counsel and Judge Feikens in the last week and had settled *Hadix* in concept, and the defendant State of Michigan was to submit the proposed Consent Judgment. (*U.S.A.* hearing transcript, June 21, 1984, p. 3, 1.21 to p. 4, W.4)

July 17, 1984 -- draft agreement.

July 23, 1984 -- pre-trial status conference with the Court outlining the areas of agreement and unresolved issues and highlighting the differences between *Hadix* and *U.S.A.* Issues with respect to the physical plant and management of the Central Complex of SPSM are resolved. Defendants assert that they prevailed upon the visitation claims of the plaintiffs. Left unresolved are the issues of access to the courts, classification of

prisoners, and the due process issues on prisoners' disciplinary and administrative segregation.

August 8, 1984 -- meeting with the Court on issues of access, due process, and classification which are to be tried.

September 19, 1984 -- notice to the members of the class regarding objections to the proposed consent decree to be filed by November 15, 1984. (Hearings on the consent decree are scheduled for December 13, 1984, and later rescheduled to January, then February 1985.

February 13, 1985 -- a class action hearing pursuant to Fed.R.Civ.P. 23(e) regarding the acceptance of the consent decree.

April 4, 1985 -- court opinion approving the consent decree.

May 13, 1985 -- order accepting the Consent Judgment.

II. THE LEGAL STANDARD FOR FEE AWARDS:

a. The Attorney's Fees

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), the Supreme Court noted that attorney's fees under 42 U.S.C. §1988 should be awarded to plaintiffs' counsel who achieved limited success only for those parts of the case in which plaintiffs prevailed. The *Hensley* opinion set out a two step approach to consider "reasonable" attorney's fees. It begins with the "lodestar", the hours spent on a case multiplied by a reasonable hourly rate of compensation for each attorney involved. This approach was developed in *Lindy Bros., Inc. v. American Radiator and Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973), (Lindy I). The

Corp., 487 F.2d 161, 167 (3rd Cir. 1973), (Lindy I). The Supreme Court noted that the lodestar calculation "provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U.S. at 433, 103 S.Ct. at 1939. The Supreme Court, however, added:

> The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward....

461 U.S. at 434, 103 S.Ct. 15 1940. The Court then noted that the district court could consider other factors that had been identified by the Fifth Circuit in *Johnson v. Georgia Highway Express,Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). Johnson set out a twelve factor approach that included not only time and customary fees, but also the novelty and difficulty of the question, the preclusion of other employment, whether the fee is fixed or contingent, the time limitations imposed by the client or circumstances, the amount involved, the results obtained, the undesirability of the case, and awards in similar cases.

In *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), the Supreme Court upheld payments ranging from $95[2] to $105 per hour to three Legal Aid Society attorneys. The Court held that a reasonable fee under §1988 is to be calculated according to prevailing market rates and not the actual costs of the services provided. *See also Northcross v. The Board of Education of Memphis City Schools*, 611 F.2d 624, (6th Cir. 1979), *cert. denied* 447 U.S. 911 (1980). Market rate legal fees should be awarded even where plaintiffs were represented by publicly paid Legal Services attorneys. *Blum* added that the

[2] Footnote 4 of *Blum* notes that Ann Monnihan, with one and a half years of practice experience, was paid at $95 an hour; Paula Gallowitz, who had clerked for a state judge after graduation and had an additional one and a half years of practice experience, was paid at $100 per hour; and Arthur Fried, who clerked for a United States District Court judge and had one and a half years of practice experience, was paid at $105 per hour. This fee award was made pursuant to an application of November 1980 for work in a lawsuit that had commenced in 1978.

Civil Rights Attorneys Fees Award Act in §1988 directed that fees be governed "by the same standard which prevailed in other types of equally complex Federal litigation, such an anti-trust cases" and that they not be reduced because the rights involved are not measurable in a pecuniary fashion.

Justice Powell in a unanimous opinion in Blum noted that the lodestar figure was not a mere "rough guess" or initial approximation of a final award. He added:

> When... the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee.

465 U.S. at 897, 104 S.Ct. at 1548. *Blum* refined *Hensley* in limiting the factors that the district court could consider in making an adjustment to the lodestar amount. It reiterated the *Hensley* comment that many of the *Johnson* factors "are subsumed within the initial calculation" of the lodestar. The lower court in *Blum* had enhanced the amounts awarded by 50% because of the quality of representation, the complexity of the issues, the riskiness of success, and the great benefit it conferred on the large class of medicaid recipients. The Supreme Court in *Blum* reversed the lower court on this 50% enhancement of the lodestar. It noted that the District Court and the Court of Appeals did not adequately articulate reasons justifying the enhancement.[3] It found the District Court's explanations did not withstand examination since the novelty of the issues was presumably reflected in the number of billable hours, and the special skill and experience of the attorneys were reflected in their hourly rates. The special quality of representation also "generally is reflected in the reasonable hourly rate". 104 S.Ct. at 1549.

> In view of our recognition that an enhanced fee may be justified "in some cases of exceptional success," we cannot agree with the petitioner's argument that an "upward adjustment" is never permissible. The statute requires a "reasonable fee," and there may be

[3] *See also* the post-*Blum* case of *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916, at 923-24 (6th Cir. 1984).

> circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high. [The Court then notes here that the lodestar is presumed to be a reasonable fee under §1988.]
>
> * * * *
>
> . . .The burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant.

104 S.Ct. at 1548. The Supreme Court stated that the district court had, without elaboration, accepted plaintiff's counsel's conclusory assertions for the upward adjustment, referring to the complexity of the litigation, the novelty of the issue, the high quality of representation, the "great benefit" to the class, and the "riskiness of the lawsuit."

> Because acknowledgment of the "results obtained" generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award.

104 S.Ct. at 7549. In a footnote, the Supreme Court noted that the number of persons benefited also was not a significant consideration under §1988. *Id.* n. lb. It then stated that the district court had failed to show any evidence in the record as to why the benefit achieved required an upward adjustment. It held the record demonstrated that the fee schedule of $95 to $105 per hour was reasonable but that there was not sufficient evidence to justify the enhancement sought by plaintiffs counsel. Thus, plaintiffs failed to carry their burden of justifying an entitlement to an upward adjustment.

After *Blum*, novelty and complexity of the issue, special skill and experience of counsel, quality of representation, and results obtained from the litigation are presumed to be reflected adequately in the lodestar amount and without some special showing they cannot serve as an independent base for increasing the basic fee award. *Blum* left unresolved the issue

of whether risk of loss could ever justify an upward fee adjustment. 104 S.Ct. at 1550, n 17.

The evidentiary hearings on attorney's fees in the present case were undertaken in light of *Hensley, Blum, Northcross,* and *Davis*. Counsel provided evidence on reasonable hourly rates and the number of reasonable hours incurred to establish the lodestar. Fee petitioners further submitted evidence, which plaintiffs' attorneys in *Blum* apparently had failed to do, to justify an enhancement. Petitioners assert that the lodestar, which is presumed to be a reasonable fee under *Blum*, is not adequate compensation in the present case. Defense counsel offered several depositions, affidavits, and cross-examination to oppose any enhancement. Plaintiffs' counsel submitted evidence on: (1) the quality of service rendered; (2) delay in payment; (3) the riskiness of the case, involving the novelty and uncertainty of its successful conclusion; and (4) the exceptional results that were achieved in the *Hadix* consent decree.

Subsequent to the extensive hearings and testimony taken on these issues in this case, the Supreme Court on July 2, 1986, decided *Pennsylvania v. Delaware Valley Citizens Council For Clean Air*, 106 S.Ct. 3088 (1986). In that case, six justices joined in an opinion that seems to raise even higher the presumed reasonableness of the *Lindy* lodestar. The majority discounts the *Johnson* twelve factors approach as providing little guidance for the lower courts. The majority expresses concern that *Johnson* permits too many subjective factors to limit the discretion of trial judges and avoid disparate results.

In *Delaware Valley*, the lower court had granted fee awards of between $25 and $100 an hour depending upon the phases of litigation and the level of complexity of the legal tasks involved. For several of the phases, the district court granted a multiplier.[4] On one of those phases, the multiplier

[4] *Delaware Valley* was commenced in 1977 and a consent decree was entered in 1978 which involved continued litigation through 1984, with the majority of the work being done in 1981 and 1982. Two "associate level" attorneys who were admitted to practice in 1977 and 1978 and who had no prior litigation experience were granted fees of $65/hour. 726 F.2d 272, at 279 (3rd Cir. 1985). While the fee award challenge was decided in 1984 [581 F. Supp. 1412 (E.D. Pa. 1984)], the court did not use either a current fee rate or an historic rate. Instead, it used an "average rate" over the five years of litigation covered in the fee petition [762 F.2d at 278 n. 8].

was a factor of two, doubling the lodestar because of the "high quality of the representation provided in that phase." 106 S.Ct. at 3093. On three phases, it granted a multiplier of two, doubling the lodestar amount "to reflect the low likelihood of success" plaintiffs faced in that stage of litigation. Again, as in Blum, the Supreme Court did not question the hourly rates that were set in computing the lodestar but reversed the lower court on granting the enhancement for the superior quality of representation. It set for reargument next term the issue of whether risk of loss can be used to enhance a fee award.

The six justice majority in *Delaware Valley* continued to espouse at least the possibility of "upward adjustments of the lodestar figure" but reiterated in strong terms the limiting language of *Blum* and added "such modifications are proper only in certain 'rare' and 'exceptional' cases supported by both 'specific evidence' on the record and detailed findings by the lower court." 106 S.Ct. 3098.

In considering the asserted superior quality performance of plaintiff's counsel, the Court noted:

> [W]hen an attorney first accepts a case and agrees to represent a client, he obliges himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interest. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award on his post engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors comprising a "reasonable" fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

Id. at 3098-3099. Noting that the quality of counsel is "adequately" reflected in the reasonable hourly rate, the

overall quality of performance ordinarily should not be used to adjust the lodestar, thus removing any danger of "double counting.[5] The Court concluded that the District Court and the Court of Appeals failed to make detailed findings as to why the lodestar amount was unreasonable and why the quality of representation of the individual attorneys was not adequately reflected in their hourly rate times the reasonable number of hours that they invested in the case.

"Degree of success" is looked at first to determine sufficient success to qualify as a "prevailing party".

To be a "prevailing party", plaintiffs need demonstrate success "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* In determining that plaintiffs were the prevailing parties, this Court has already determined that plaintiffs have achieved success on a number of significant issues in the case that plaintiffs sought, and further determined that such success in significant ways exceeds the results achieved in *United States v. Michigan*, G 84-63, CA (W.D.Mich.), both in content and in opportunities for enforcement. Once the statutory threshold question that plaintiff's are "prevailing parties under §1988 has been determined", the district court must determine what fee is reasonable". *Hensley*, 103 S.Ct. at 1939. In determining a reasonable fee", the degree of success, however, must be looked at, a second time, often with closer scrutiny, to determine: (1) the reasonableness of the hours expended in arriving at the lodestar; and (2) whether an upward or downward adjustment should be made to the lodestar.[6]

Where plaintiff, as prevailing party, obtains only partial success this may affect the hours permitted in a fee request

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5 The majority then questioned the asserted "superior quality" of the plaintiff's counsel by noting that the lower court had discounted a 620 hour request to 324 hours because "a large number of the hours. . .were unnecessary, unreasonable or unproductive". *Id.*

6 "The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained'." *Hensley*, 103 S.Ct. at 1940.

and/or an adjustment of the lodestar. The *Hensley* opinion distinguished between two types of claims upon which a plaintiff does not succeed: (1) those which are related to the claim upon which the plaintiff prevailed; and (2) those which are unrelated -- based on different facts and different legal theories. Hensley noted that often plaintiffs assert alternate legal claims and theories involving a common core of facts and seek similar or alternate remedies related to those facts. If plaintiff ultimately achieves an excellent result on one of the legal theories, normally attorney's fees should be given for "all hours reasonably expended on the litigation." 103 S.Ct. at 1940.

> In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.... Litigants in good faith may raise ultimate legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

103 S.Ct. at 1940.

If the result is not excellent, but only partial or limited, then the fee award can be reduced either: (1) by identifying specific hours that should be eliminated; or (2) by some precentage reduction of the award to account for the limited success. 103 S.Ct. at 1941. Fees can be awarded under §1988 even when relief is granted, not on the asserted federal statutory and constitutional claims but on the alternate, pendent state claims. *Smith v. Robinson*, 104 S.Ct. 3457 (1984).

The Sixth Circuit in *Seaway Drive-In, Inc. v. Twp. of Clay*, 791 F.2d 447 (6th Cir. May 19, 1986), has recently shown how far courts have gone to permit §1988 fee recoveries where relief is not obtained on federal law. *Seaway* held that where a court grants relief on a pendent state claim, §1988 attorney fees can be awarded for work on constitutional claims never reached by the court if they were sufficiently substantial to support jurisdiction over the prevailing pendent state claim on which the party prevailed. The standard that *Seaway* uses is the

mandatory test of *United Mine Workers v. Gibbs*, 283 U.S. 715 (1966), *i.e.* the pleadings alleged a substantial federal claim that shares a common nucleus of operative fact" with the state claim upon which relief was ultimately granted. Of significance to the expansive court interpretation of §1988 fee eligibility, *Seaway* makes it clear that such fees can be awarded where relief was provided on state law grounds even if the substantial federal claim would later have been dismissed on a motion for summary judgment for lack of sufficient supporting evidence, and if the court had reached this dismissal point on the federal claim, it would have exercised its *discretionary* power not to retain jurisdiction over the pendent state claim after dismissal of the federal claim. Seaway noted, "The 'substantiality test'. . . does not contemplate . . . an inquiry into the proof behind the pleading." 791 F.2d at 452. Quoting *Smith v. Robinson*, 104 S.Ct. at 3467,[7] the court stated:

> [Section 1988] simply authorizes a district court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success.

Seaway, 791 F.2d at 454.

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[7] In *Smith* the Supreme Court found that the federal due process claim (on hearing *procedures* before denial of benefits) was unrelated to the successful state claim (providing *substantive* rights to educational benefits). In *Seaway*, ultimate success was also achieved on a pendent state claim. The Sixth Circuit, however, found there was:

> a single request for relief based on alternative legal theories -- a state law theory and a constitutional law theory. The District Court's jurisdiction over the state law claims was based, in part, on the fact that they and the constitutional law claims arose out of a common nucleus of operative fact. Thus, ... there is a sufficient relationship between the two claims to permit an award of attorney's fees on the constitutional claims.
>
> ...Hensley makes clear that the purpose of the "relationship between the claims" element of the fees award test is to prevent the award of fees in those cases where the fee and non-fee claims are aimed at achieving different results or where they are based on different facts and different legal theories.

Seaway, 791 F.2d at 455.

Seaway quotes the *Hensley* language about the difficulty of dividing "the hours expended on a claim-by-claim basis" where claims involve a common core of facts about which plaintiff asserts alternate legal theories: "Much of counsel's time will be devoted generally to the litigation as a whole." *Seaway*, 791 F.2d at 455, quoting *Hensley*, 461 U.S. at 435. In determining attorney's fees for a prevailing party:

> [T]he district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Id.

b. Attorney's Fees for Time Spent Pursuing a § 1988 Fee Award

The Sixth Circuit is in agreement with the other circuits that § 1988 fees are to be awarded for the preparation and any litigation needed to pursue a fee application. *Northcross v. Board of Education*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied* 447 U.S. 911 (1980); *Weisenberger v. Huecker*, 593 F.2d 49, 53-54 (6th Cir.) *cert. denied* 444 U.S. 880 (1979).

c. Attorney's Fees for Hiring of Legal Counsel to Pursue Petitioners' Fee Claim

Courts have allowed petitioners for civil rights attorney's fees to obtain compensation for hiring a second firm to pursue a fee claim *See e.g. Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 958 (1st Cir. 1984); *Shadis v. Beal*, 703 F.2d 71, 73 (3rd Cir. 1983). Compensation has not been allowed for the time expended by the second firm prosecuting its own fee petitions or for time spent by the attorney becoming familiar with the case or obtaining information from the petitioner attorney regarding the case. *Grendel's Den*, 749 F.2d at 958.

d. Fees, Costs and Expenses

Northcross v. Board of Education, supra, at 939, states that certain costs and expenses can be awarded under 42 U.S.C.

§ 1988 and others are appropriate under 28 U.S.C. § 1920. It notes that § 1988 authorizes an award of incidential and necessary expenses incurred in furnishing effective and competent representation", which it interprets as

> . . . . reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services. Reasonable photocopying, paralegal expenses, and travel and telephone costs are thus recoverable pursuant to statutory authority of § 1988.
>
> Other costs are on a different footing. These include costs incurred by a party to be paid to a third party, not the -attorney for the case, which cannot reasonably be considered to be attorney's fees. *See Wheeler v Durham Bd. of Educ.*, 585 F.2d 618 (4th Cir. 1978).
>
> These include, among others, docket fees, investigation expenses, deposition expenses, witnesses' expenses, and the costs of charts and maps. Most of these expenses have long been recoverable, in the court's discretion as costs, pursuant to 28 U.S.C. § 1920 . . . .

611 F.2d at 639.

Generally, fees paid for expert witnesses are not recoverable costs or recoverable under § 1920 only at the statutory witness fee rate. *See, e.g.*, 10 Wright, *Federal Practice and Procedure* § 2678, n. 17, (1982) and cases cited therein. Yet courts have widely ignored this general rule in cases brought under one of the civil rights acts. The remedial purposes of these statutes can be effectuated only if the attorneys who agree to represent civil rights plaintiffs are assured from the outset that *all* expenses reasonably incurred in the course of successful litigation will be reimbursed. In *Copeland v. Marshall*, 641 F.2d 880, 890 (D.C. Cir., 1980) (*en banc*), the court noted:

> Any fee-setting formula must produce an award sufficient to fulfill the primary purpose of awarding fees in Title VII cases, namely, "to encourage individuals injured by discrimination to seek judicial relief." *Piggie Park*, 390 U.S. at 402, 88 S.Ct. at 966. An award of fees provides an incentive to competent lawyers to undertake Title VII work only if the award adequately compensates attorneys for the amount of work performed.

See also, Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) (*en banc*) (quoting S.Rep. 94-1011, 94th Cong. 2d Sess.2: "If private citizens are to be able to assert their civil rights then citizens must have the opportunity to recover what it costs them to vindicate those rights in court."), and cases cited therein.

To effectuate the purposes of 42 U.S.C. § 1983, courts must have the power to order reimbursement to a prevailing plaintiff all reasonable and necessary expenses incurred in pursuing successful claims. Courts have often

> awarded the full fees of experts on the ground that their testimony and assistance were necessary or helpful in representing clients in civil rights litigation. . . . Counsel must have the assistance of experts to furnish effective and competent representation. In most civil rights litigation, *and in prison cases in particular, expert testimony is a vital ingredient in the proper presentation and decision of a case. Without the ability to recover experts' fees, plaintiffs, particularly prison inmates who are almost always indigent, will be unable to bring these cases.*

Jones v. Diamond, supra, at 1382. (Emphasis added.) *See also, Keyes v. School District No. 1*, 439 F. Supp. 393, 419 (D.Col. 1977) (expert witnesses fees awarded because the claim "could not have been established nor a viable desegregation plan determined" without expert testimony) *Wallace v. House*, 377 F. Supp. 1192 (W.D.La. 1974) and cases cited therein; *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354, 382-83

(D.D.C. 1983) (awarding fees in a Title VII action for "all expenses incident to the litigation that are normally billed to fee-paying clients, are reasonably incurred in the litigation, and are sufficiently documented."). *See also, Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700 (E.D.Pa. 1977)

While the *Northcross* language noted above would seem to limit certain investigation and witness fees, it is not clear that such is the law of the Sixth Circuit This *Northcross* language could be read merely as *dicta* to guide the district court on remand. It is not informed by either the prevailing trend in other circuits nor by lower court opinions in this Circuit. This Court, in *Greenspan v. Automobile Club of Michigan*, 536 F. Supp. 411 (E.D. Mi. 1982), followed in *NAACP v. Detroit Police Officers Ass'n.*, 620 F. Supp. 1173 (E.D. Mi. 1985), has allowed actual costs for expert witnesses under a civil rights attorney's fees statute and not limited to the $30 per day statutory limits of 28 U.S.C. § 1920. The *Greenspan* test is whether the experts were reasonable and necessary in the service of the litigation. Such a ruling is consistent with the prevailing case law trend and the purposes of § 1988. Such reasoning would apply the reasonable and necessary test to pretrial preparation in cases that are settled since only such an extension would serve the remedial policy considerations of §§ 1983 and 1988 and the public policy considerations of furthering consensual and cooperative resolution of these disputes by negotiated settlements.

e. An Offer of Judgment and Attorney's Fees under § 1988

In the present case, defendants made an offer of judgment which plaintiffs- rejected. Fed. R. Civ. P 68 provides if a timely pretrial offer of settlement is not accepted and the final judgment does not exceed the offer, "the offeree must pay the costs incurred after the making of the offer." *Marek v. Chesny*, 105 S.Ct. 3012 (1985), held that "costs" in Rule 68 included attorney's fees under 42 U.S.C. § 1988 since these are awarded "as part of the costs." Thus, if the final judgment is not more favorable than the rejected offer of judgment, a prevailing plaintiff "will not recover attorney's fees for services performed after the offer is rejected." 105 S.Ct. at 3018. In *Marek*, the final judgment was by trial as in many other reported cases. While no reported cases were

found, the Rule 68's language, and the policy considerations underlying it, should include a final judgment reached by settlement.

III. FINDINGS OF FACT

A. STIPULATION OF PARTIES REGARDING CERTAIN OF DEFENDANTS' OBJECTIONS:

As part of their response to the petitioners application for fees, the defendants objected that a number of the hours were inadequately described as to the work performed (Objection 3); that they involved a duplication of effort among the various counsel for the plaintiffs or excessive times for the tasks accomplished (Objection 4) the work was performed on unsuccessful or unresolved claims in the lawsuit (Objection 5); and also that certain of petitioner Bennett's fee requests were not supported by contemporaneous time records for periods prior to the Fall of 1982. (Defendants' Objections to Fee Petitions filed January 2, 1986).

The parties have entered into a stipulation regarding these particular objections. As part of that stipulation, all of these objections shall be fully resolved by a deduction of 6.5% of the total hours set forth in each of the petitions filed by plaintiffs' attorneys. The reductions agreed to are as follows:

LARRY BENNETT

Hours	1,9993.25
Less 6.5.%	129.56
Adjusted Balance	1,863.69

IUDITH MAGID

Hours	1,078.00
Less 6.5%	70.70
Adjusted Balance	1,007.93

PATRICIA STREETER	
Hours	905.00
Less 6.5%	58.83
Adjusted Balance	846.17
MICHAEL BARNHART	
Hours	385.00
Less 6.5%	25.03
Adjusted Balance	359.97
THOMAS LOEB	
Hours	493.65
Less 6.5%	32.09
Adjusted Balance	461.56

In entering into this stipulation, the defendants reserve any and all objections they have made to the petitioners' fees with regard to their claims that plaintiffs' attorneys have waived their claims to fees, that they do not qualify for prevailing party status (Objection 2), and that their fee petitions are excessive due to the limited degree of success in light of the *U.S.A.* case (Objection 7).

The defendants' other objections are that the hourly rates asserted by the petitioners were unsupported by market rates in similar cases by attorneys with similar qualifications and were excessive in light of the ineffective management of the case or the type of work performed and failed to account for the historic rates charged in years prior to 1985.

B. SPECIAL MASTER FINDINGS:

1. Conditions of Confinement at SPSM-CC

Since the *Hadix* issues concerning the physical conditions and administration at SPSM-CC were resolved by the consent decree, there were no formal findings of which, if any, conditions at the prison were sufficiently severe as to be violations of the Constitution. While this matter did not need to be resolved on the merits of the case, the conditions of the prison are relevant to the significance of the results obtained in determining petitioners' appropriate attorney's fees.

Smith and *Seaway, supra*, note that 42 U.S.C. § 1988 "authorizes a district court to assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success." 104 S.Ct. 15 3467, 791 F.2d at 454. In determining a reasonable attorney fee, the issue of the significance of the relief obtained can be resolved without this Court making specific and detailed findings on each of the prison conditions challenged in the litigation. It suffices for the Court to make a general determination that the conditions leading to the litigation constituted grounds for a good faith constitutional claim and further that the relief obtained provided a significant remedy for those conditions.

Accordingly, it is found that the *Hadix* litigation involved a prison facility that was in an extreme state of disrepair involving conditions of confinement sufficiently severe to warrant plaintiffs' claim that the Eighth Amendment was violated.

2. Significance of the Relief Obtained

The *Hadix* consent decree provided an adequate remedy to the worst conditions of confinement alleged by the plaintiffs as well as the areas of concern expressed by the United States Department of Justice in its report and through its employees.

A substantial number of inmates will benefit from the *Hadix* consent decree, including not only the class members but all future Michigan inmates coming through the Reception and Guidance Center or being assigned to SPSM-CC.

The results obtained in this case are in no way lessened because they were achieved through negotiations instead of trial and court order. Notwithstanding the conflicts between counsel during the protracted *Hadix* negotiations, the achievement of this negotiated settlement is likely to lead to smoother implementation of the consent decree and create an atmosphere of cooperative interaction. These results would likely not have been achieved had the matter necessitated a trial and a court ordered remedy. As a result, the lawyers services involved in the negotiation of this consent decree were of equal value to attorney time that would have been spent in the continued preparation and/or trial of the matter.

The negotiated results obtained in the consent decree of this case serves the interest of the plaintiffs, the defendants, and the public by resolving a substantial, complex and politically controversial issue.

3. Relief Obtained and Relief Sought

Plaintiffs in their First Amended Complaint sought both declaratory relief as well as an injunction prohibiting the defendants from confining prisoners at SPSM-CC. The relief obtained in the *Hadix* consent decree includes: improvements in the physical conditions, staff training, sanitation, fire safety, physical and mental health care, law library facilities and access, as well as provisions undertaking and implementing a management and organization study to improve prison administration, and rights of enforcement for the inmate class. The prisoners enforcement rights include conciliation, mediation, and possible court intervention to enforce not only constitutionally prohibited conditions at SPSM-CC, but also conditions-that violate state law and the prison's own procedures, policy guidelines and operating principles. While plaintiffs did not petition for improvement of the prison conditions as an alternative to closure of the facility -- possibly as a matter of litigation and negotiation tactics -- the relief sought in negotiations and obtained by the petitioners on behalf of the plaintiffs' class is significant and for all purposes serves as a reasonable and adequate substitute for the relief requested. Since the plaintiffs' class litigation was aimed, broadly speaking, at relief from the unconstitutional conditions of confinement that they faced, the relief obtained in the Consent Judgment effectively achieved this overall goal of the plaintiffs' litigation.

4. Relation of U.S.A. Decree and the Hadix Decree

The results obtained in *Hadix* achieved more protections for inmates than were obtained in the *U.S.A.* case. This finding has been earlier made by this Court in the February 6, 1986, Memorandum Opinion and Order denying Defendants' Motion for Summary Judgment and was also acknowledged by Judge Richard Enslen in his *U.S.A. v. Michigan* opinion of December 2, 1985, at p. 11. Unlike *U.S.A.*, the *Hadix* decree

provides for Implementation of an organization and management study and plan that will result in the division of SPSM-CC into separate administrative prison units. Unlike *U.S.A.*, the *Hadix* decree provides a means of enforcement directly by prison inmates. Unlike *U.S.A.*, the *Hadix* decree provides remedies and enforcement powers not only for unconstitutional conditions of confinement but also other severe conditions that fall short of being unconstitutional. Unlike *U.S.A.*, the *Hadix* decree provides for enforcement of state statutes affecting SPSM-CC and also Department of Corrections' written procedures, policy guidelines and other operating principles. Unlike the *U.S.A.* decree, the *Hadix* decree provides for mediation on disputes arising on compliance. The *Hadix* decree is also more extensive and more specific than the *U.S.A.* decree and therefore will be easier to monitor and enforce.

Notwithstanding the fact that the *U.S.A.* Consent Judgment was entered at a point in time earlier than that of *Hadix*, the *Hadix* litigation preceded the *U.S.A.* case. Plaintiffs' counsel in the *Hadix* case provided significant assistance on information and access to witnesses to assist members of the Justice Department in their bringing of the *U.S.A.* case.

The *Hadix* case was initiated both prior to the initiation of *U.S.A.*, as well as prior to the initiation of the investigation that led to the *U.S.A.* case.

Most of the information obtained by the attorneys and/or experts involved in the *U.S.A.* case was not shared with the counsel in *Hadix* in a timely manner that would provide them any substantial assistance.

While defense counsel in opposition to plaintiffs' fee petitions has asserted that the *U.S.A.* case eclipses the *Hadix* case and that the results achieved in *U.S.A.* achieved in substantial part everything that was obtained in the *Hadix* consent decree, it was earlier the position of various representatives of the Attorney General's office during early 1984, prior to the acceptance of the *U.S.A.* consent decree, that the *Hadix* case was a separate litigation and that while dealing with significant areas of overlap with that of *U.S.A.*, it

was to be treated as a separate litigation and negotiated separately in good faith. It was also suggested to Judge Enslen by Assistant Attorney General Andrew Quinn that the language in paragraph "M" of the *U.S.A.* consent decree -- that states the *U.S.A.* decree shall not operate to render *Hadix* moot -- was unnecessary language and that Mr. Quinn could think of no grounds to argue any issue preclusion in *Hadix* as a result of the entry of the *U.S.A.* consent decree.

In passing CRIPA, 42 U.S.C. § 1997, Congress did not intend that statute nor suits brought by the Justice Department under it to derogate the rights of any inmates to enforce their legal rights under 42 U.S.C. § 1983 or § 1988. *See* 42 U.S.C. § 1997j., and S.Rep. 96-416 at 31, in 1980. U.S. Code Cong. and Adm. News, at 813.

Finally, the current Director of the Michigan Department of Corrections, Robert Brown, acknowledged that the *Hadix* decree went beyond the *U.S.A.* decree and would take additional state funds to implement. (Petitioners' Exhibit #1.)

5. Nature of the *Hadix* Litigation.

The *Hadix* case involved novel and complex issues of constitutional law.

The *Hadix* case involved complex, multifaceted issues of fact. The handling of the *Hadix* case required attorneys of special skill and experience in complex federal civil rights law as well as in litigation requiring protracted discovery, advocacy and negotiations on multiple areas.

The defendants' in the *Hadix* litigation, through their counsel, the State's Attorney General's office, vigorously resisted the factual and legal allegations of the plaintiffs. In their zealous defense, they undertook extensive discovery and filed numerous complicated pretrial motions regarding the sufficiency of the plaintiffs' allegations and proofs.

6. Degree of Risk

From October of 1980 until January 28, 1983, when defense counsel indicated a willingness to negotiate a

settlement and not to contest the issues of liability, the overall situation in the *Hadix* case involved a substantial risk of loss. (As suggested by the Supreme Court in *Delaware Valley*, this period shall hereinafter be noted as *Litigation Phase I.)* This risk was a product of limitations in constitutional tort law on conditions of confinement, complex factual disputes regarding the physical and administrative conditions at SPSM-CC, as well as the vigorous opposition and zealous legal services provided by the Attorney General's office on behalf of the defendants.

By June 1982, the Justice Department in its report (the Schoen Report) and the October 29, 1982, letter from William Bradford Reynolds to Governor Milliken also noted substantial failings in the physical conditions at SPSM-CC that suggested unconstitutional conditions of confinement. The Reynolds letter warned that the Justice Department would commence a CRIPA action. Plaintiffs' counsel did not have access to the Schoen Report to know the specifics and the significance of its findings at any time during *Litigation Phase I.* The Schoen Report was turned over to plaintiffs' counsel by court order in May of 1983 during the initial stages of the negotiation of the *Hadix* consent decree.

While the risk of loss was substantial in *Litigation Phase I* (October 1980 through January 28, 1983), the risk of loss continued, though at a substantially lower degree, from the period of January 1983 through the pretrial meeting with the Court on June 14, 1984, at which time it became clear that a negotiated settlement and consent decree would likely be achieved. (This January 29, 1983 - June 14, 1984, period shall be referred to as *Litigation Phase II*. Periods after June 14, 1984, shall be referred to as *Litigation Phase III.*)

While the process of negotiations was undertaken in the Spring and Summer of 1983, towards the end of that year and at the beginning of 1984 it appeared that negotiations would not result in a consent judgment and that trial would be necessary. During that period of time, the Court set up a schedule for final pretrial discovery, pretrial conferences, and trial dealing with the issues of the *Hadix* case that might not be resolved. Mr. Brian MacKenzie was defendants' chief counsel for purposes of litigation. He was taken off of the *Hadix* case

after the January 28, 1983, final pretrial conference in the anticipation that the matter would be resolved by negotiations. Mr. MacKenzie became involved again in 1984 when it appeared the case would require trial. Mr. Bennett told Judge Enslen on March 23, 1984, that negotiations had broken down and trial was anticipated in June or July of 1984. (*U.S.A.* March 23, 1984, hearing transcript, p. 13.) Even now the defendants assert that they did not concede liability. (See MacKenzie and Fischhoff affidavits filed March 21, 1986). It was only following the exchange of proposals in March through mid-June of 1984, as well as the defendants' expressed willingness to implement the findings of a management study, that it appeared at the meeting with the Court of June 14, 1984, that settlement was virtually assured. Thus, it is found that only as of June 14, 1984 (the end of *Phase II*) was there no further degree of risk of loss in this matter.

7. Attractiveness of the Hadix Litigation and Burdens on Plaintiffs' Counsel

The *Hadix* case was an unattractive one for attorneys in private practice to undertake because of a number of factors: (1) the substantial time involvement that would be required of plaintiffs' attorneys; (2) the protracted litigation against vigorous opposition that it would likely entail; (3) the substantial expenses and expert witness fees they would need to advance; (4) the lack of fee-paying clients; and (5) the risk of loss. Certain lawyers from prominent Detroit law firms refused to become involved in the *Hadix* case, and even Mr. Loeb's firm expresses reservations about his involvement.

Each of the petitioners' involved in the *Hadix* case were limited in their ability to undertake other legal work for which there would have been been greater assurance of reasonably prompt payment of attorney's fees and any costs expended. Each of the petitioners involved in the *Hadix* case were limited in their ability to undertake other legal work that would have been more certain to enhance their future law practice.

8. Costs and Expenses

Substantial costs and expenses were advanced in *Hadix*

by Larry Bennett, and lesser amounts of costs were advanced by the other plaintiffs' counsel. These costs, particularly the expert witnesses concerning the conditions and administration of SPSM-CC and the Reception and Guidance Center, were reasonable and necessary to adequate preparation of plaintiffs' case for trial and the information obtained was helpful in achieving the Consent Judgment. Such costs are of the type ordinarily reimbursed by the client. In the present case, the costs and expenses will not be recouped by petitioners in the absence of their inclusion in a § 1988 fee award.

9. Petitioners' Retention of Expert Consultants

Counsel for plaintiffs were involved in litigation requiring expert witness assistance on the physical plant including architectural and sanitation systems, upon correctional practices and management, nutrition, classification, and psychological care. The hiring of these expert consultants in a complex, multi-faceted prison case was reasonable and necessary to the proper preparation of the case for trial or a negotiated settlement.

Not to award such expenses upon settlement instead of trial would discourage negotiated resolutions of civil rights claims and would also handicap prisoners' attorneys in proper preparation and fulfilling their obligations to their clients under Canon-6 of the Code of Professional Responsibility.

10 Quality of Petitioners' Legal Services

The legal representation provided by petitioners to plaintiffs was of the highest professional quality.

11. Reasonableness of the Petitioners' Attorney Time

a. Attorney Time Spent on the Merits

The question of whether the time spent by petitioners on the merits of the case was reasonable and related to the issues upon which they prevailed is mooted by the stipulation of counsel to a percentage reduction of 6.5% for inadequately

described work or work that was excessive, duplicative or performed on unsuccessful or unresolved claims. (See Appendix B).

b. Time Spent on the U.S.A. Case

The time spent by plaintiffs' counsel pursuing limited intervention and exclusion from the *U.S.A. v. Michigan* decree before Judge Richard Enslen was reasonable and appropriate action to protect the legal position of the *Hadix* class and assure that the ultimate consent decree was not undermined by the *U.S.A.* decree or enforcement. While Judge Enslen granted the Hadix petitioners limited standing as *amicus curiae* (*U.S.A.* Consent Decree ¶ 0) and clarified the relation between *U.S.A.* and *Hadix* (*U.S.A.* Consent Decree ¶ M) , he denied their exclusion from the *U.S.A.* decree. Nonetheless, the efforts of the *Hadix* attorneys did alert Judge Enslen to the care needed in the future not to allow the *U.S.A.* decree to undercut *Hadix*, and further provided the *Hadix* counsel with future standing as *amicus curiae* and with access to information copies of the *U.S.A.* implementation plans and reports (*U.S.A.* Consent decree ¶¶ I, K and L) as well as any proposals for modification of the *U.S.A.* decree (*U.S.A.* Consent Decree ¶ J)

c. Attorney Time Pursuing the § 1988 Fee Award.

The fee petitioners have submitted supplemental petitions for attorney's fees and costs involved in pursuing this fee petition. The fee petition issue and hearings have been vigorously resisted by defendants and their counsel which has led to extensive preparation, briefings, and hearings on these issues. The petitioners' time spent on this § 1988 matter was reasonable and necessary to meet the zealous defense to the attorneys' fee petitions presented by the assistant attorney general involving disputes of law and fact on prevailing party status, the hours and rates to be compensated, and any adjustment. The Sixth Circuit and other courts allow such fees to effectuate the purposes of § 1988. *Northcross, supra* at 637, citing *Weisenberger v. Huecker*, 593 F.2d 49 (6th Cir. 1979).

There were, however, certain inefficiencies and duplication in the Bennett petition due to the involvement of separate outside counsel who were unfamiliar with the

extensive history of the *Hadix* litigation. There are also certain legal services on the fee petition on issues upon which the plaintiffs' counsel do not prevail.

12. Dr. Stiffman's Statistical Analysis

Dr. Lawrence Stiffman is an expert statistician with knowledge and experience in determining the fair market value of attorney's fees in the Southeastern Michigan area. His initial, February 10, 1986, determination (Defendants' Exhibit 3) of an appropriate hourly speciality rate of $90 for all attorneys narrowly defined speciality as requiring 100% of the attorney's time in that field. Specialization experience can be achieved by an attorney who spends 25% or more of his or her time in a specific area of legal practice. Thus, Stiffman's supplemental data of April 18, 1986 (Defense Exhibit 3A), by using this broader and more realistic definition of specialization, more accurately indicates median hourly rates of attorneys with specialized federal litigation experience similar to most of the petitioners. That exhibit shows a median hourly rate of all Michigan attorneys of $75 per hour as of the survey date, July 1984. It shows median rates for specialists of $100 for attorneys practicing 10 years or more in the fields of civil rights, securities law, antitrust, bankruptcy, and labor law. (Dr. Stiffman's Exhibit 10 of Defendants' Exhibit 3A). These speciality fields are comparable to those of petitioners Bennett, Magid, Loeb, and Barnhart. Dr. Stiffman's Exhibit 3A shows attorneys with 10 - 14 years practice in speciality fields who were at the 75th and 90th percentile billing $120 and $125 respectively

The 1981 State Bar of Michigan Economics of Law Practice Survey shows a median Michigan hourly rate for full-time practice of $65 per hour as of the April 1981 sampling date. (Michigan Bar Journal, February 1982). The 1984 survey shows a ten dollar increase in median hourly rates for all Michigan attorneys in the three years. It is judicially noticed under Fed. R. Evid. 201 that the Consumer Price Index from 1984 to April 1986 shows an increase for all items of 4.6% (from 311.1 to 325.5). These data would suggest that Dr. Stiffman's rates from the Summer of 1984 are $5 - $6 lower than current market value rates. This is consistent with the federal litigation specialists' affidavits of current billing rates

in Plaintiffs' Exhibits 12, 13, 14, 15, and 16 showing a range of $125 to $155. These exhibits accurately reflect current market rates for highly respected attorneys of substantial experience in the Detroit area who are involved in federal litigation.

Years in practice for attorneys Magid, Barnhart and Loeb should include years these attorneys spent in legal services or public defender work since these experiences provide opportunities for professional growth comparable to private practice, particularly at a law reform unit of a major metropolitan legal services program such as the Center for Urban Law where Ms. Magid and Mr. Barnhart worked. Dr. Stiffman's initial submission considered only years in *private* practice for Magid, Loeb and Barnhart.

13. Delay In Payment

Delay in payment of costs and attorney's fees causes lost use of the funds as well as an erosion of purchasing power due to inflation.

It is judicially noticed under Fed. R. Evid. 201 that the Consumer Price Index for all items was the following:

1980	246.8
1981	272.4
1982	289.1
1983	298.4
1984	311.1
April 1996	325.5

Thus, there has been a cummulative inflation of over 30% during the course of the *Hadix* litigation.[8] It is also judicially noticed under Fed. R. Evid. 201 that federal court post-judgment interest rates, determined by Department of Treasury 52-week Treasury Bills, have exceeded 6% interest throughout the period of this litigation, were above 10% much of the time, and on numerous occasions exceeded 12%.

Some courts adjust the lodestar upward to account for delay in payment, others use an hourly rate charged at the time of the filing of the fee petition (the "current rate") rather

[8] The increase from 246.8 (1980) to 325.5 (April 1986) is 31.88%.

than lower hourly rate that might have been applicable at the time the service was rendered ("historic rate"). *See e.g., In re Agent Orange*, 611 F. Supp. 1296, 1327 (S.D.N.Y. 1985), *Copeland v. Marshall*, 641 F.2d 880, 893 n. 23 (D.C. Cir. 1980) (*en banc*). The Supreme Court has not addressed this issue. The Sixth Circuit has established no fixed rule other than that the district court should consider the impact of inflation in considering the use of an historic or current value rate. *Louisville Black Police Officers v. Louisville*, 700 F.2d 268, 274 (6th Cir. 1983). *Northcross v. Board of Education*, 611 F.2d 624, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

In the present case, the use of the current rate instead of an historic rate is appropriate to adjust for lost interest and inflation due to delay in payment. If one were to take the median attorney fee for non-specialists in 1980 ($65.00)[9] and adjust by compounding interest figured at 3% over the inflation rate [10], the $65 (1980) figure would be $90 in 1984 and in excess of $100 in 1986. The last median rate available of all non-specialist attorneys in Michigan surveys was for 1984, it was $75 per hour. This is below the $90 (1984) computed above by compounded interest rates. This suggests that use of current market rates does not overcompensate the petitioners but slightly under compensates them since it primarily reflects inflation and not lost use of money. The reality that not all billings are collectible is a factor that lessens the impact of any under compensation resulting in the use of the current rate in lieu of an adjustment for delay in payment.[11] Since § 1988 does not mandate exactitude but seeks to arrive only at a reasonable rate, use of the current billing rates is a sufficient upward adjustment to compensate for delay in payment in the present case. Its use will avoid determining precisely when each of the five petitioners raised their historic rates, what interest rates should be used for each year, and the substantial task of computing compounded

[9] Unfortunately, the 1981 Survey did not report a specialist median rate, thus a comparison of the 1981-1984 Survey results is done on the median attorney rate for all Michigan attorneys.

[10] 1980/81 - 13%, 1981/82 - 9%, 1982/83 - 6%, 1983/84 - 7%, 1984/85 - 6%, 1985/86 - 6%.

[11] The 1984 Economics Survey found "Over 32 percent of the respondents report that upwards of 8% of their billed fees are not collected." Michigan Bar Journal, December 1985 at p. 1312.

interests for each year for each petitioner.

14. Larry Bennett

Larry Bennett was lead counsel in the *Hadix* case, assisted in part by Judith Magid. He was the initial attorney involved for the plaintiffs. He had primary responsibility for coordination and direction of the plaintiffs' case. Mr. Bennett has practiced law since 1976. He has an excellent reputation as a skillful and diligent civil rights attorney. He has certain national recognition in the speciality field of prisoner litigation. Mr. Bennett has taught and lectured in the civil rights field.

The range of current prevailing market attorney's fees for federal litigation of similar complexity to the Hadix case is from $95 to $155 per hour. Attorneys from respected Detroit law firms doing federal litigation and with similar years of experience of Mr. Bennett charge $125 or more per hour. Mr. Bennett presently bills at $125 per hour for civil rights work and has been awarded civil rights attorney's fees in other cases at $125 per hour. Mr. Bennett seeks a base rate in *Hadix* of $150 per hour. A reasonable hourly rate for Larry Bennett for legal services performed on the merits of the *Hadix* case is $125 per hour.

Mr. Bennett has incurred the following expenses which were reasonable and necessary to preparation for litigation and the successful negotiated Consent Judgment in Hadix and in presentation of his fee petition:

David Fogel	Fees and Expenses	$ 4,113.34
Brad Fisher	Fees and Expenses	$ 3,384.01
Ezra Ehrenkrantz	Fees and Expenses	$10,211.20
Robert Powitz	Fees and Expenses	$ 849.00
John Apol –	Research performed in connection with defendants' motion for summary judgment [12]	$ 2,450.00

12 This is an attorney fee for work performed by Professor Apol that would otherwise have needed to be done by another petitioner counsel. Professor Apol's consulting fee is less than any of the hourly rates recommended in this report.

Depositions	$ 774.90
Witness fee, Dale Foltz	$ 40.00
Telephone	$ 935.68
Photocopy (2915 x $.10)	$ 291.50
Joint Bar Project Grant Expense [13]	-0-
Steve Berlin, Expert Witness Fee[14]	$ 870.00
Joseph Hardig Expert Witness Fee[15]	$1,040.00
Butzel, Keidan, Simon, Myers & Graham (See Section 15 below)	$10,086.00
TOTAL	$35,045.63

15. The Use of Outside Counsel to Represent Fee Petitioner:

Petitioner Bennett hired the law firm of Butzel, Keidan, Simon, Myers & Graham (a firm that he has now joined as an attorney) to represent his attorney's fees claim. The Court should look with particular scrutiny at such claims by attorney petitioners that they need to hire outside attorneys to represent them in fee petitions. Courts should be resistant to efforts that turn fee petitions under § 1988 into extensive adversarial contests which, in many civil rights cases, could eclipse the amount of attorney activity involved on the underlying merits of the case. While at times the petitioner attorney might find it awkward to take depositions, solicit self-laudatory testimony from other attorneys, or be able to

13 A grant of $5,000 from the Joint Bar Law Reform Project (JBCRP) to Larry Bennett with its conditional repayment provisions (Plaintiffs' Exhibit 19) is a separate contract between plaintiffs' counsel and the JBLRP. It is not an awardable cost.

14 The Berlin deposition ordinarily would not have been a reasonably and necessary expense to evaluate the degree of success. Yet, in the present case, the defendants' undertook adament efforts to portray the *U.S.A.* decree as a monumental outcome that made *Hadix* decree an anticlimax of insignificant proportion. This made petitioners resort to Mr. Berlin, the Justice Department lawyer in *U.S.A.*, a reasonable counter-move to establish the historical roots and true dimension of *U.S.A.* compared to *Hadix*.

15 Mr. Hardig's involvement was made necessary and reasonable to counter the forceful defense expert testimony of Dr. Stiffman. Mr. Hardig's testimony was initially proffered by petitioners cost in a cost efficient affidavit form. His live testimony was undertaken to accommodate defense counsel's request to cross-examine. Thus these costs are reasonable in pursuit of the fee petition.

maintain a professional distance from opposing counsel when the issue at stake is fees directly payable to that attorney, § 1988 fee petitions should be handled in a manner to minimize such dangers and eliminate the need for multiplication of attorneys. in these suits with the needless duplication of effort required to educate new attorneys about a case on which petitioning attorneys already have intimate familiarity.

In the present case, it was demonstrated by the other petitioners that they could adequately handle their own fee petitions. In the present case, Mr. Bennett has argued for and often been the principal spokesperson for the fee petitioners. It is not clear that retention of separate counsel was necessary.

The undersigned has made a detailed and elaborate review and comparison of the itemized billings submitted by Larry Bennett as well as those submitted by the Butzel, Keidan law firm regarding the preparation and presentation of the fee petition. Mr. Bennett has carefully omitted certain hours in which he was consulting with the Butzel, Keidan firm. The retention of outside counsel was inefficient in certain aspects and duplicative in others. More substantial hours need be omitted than the minimum numbers proposed by Mr. Bennett. While the use of outside counsel may have been a convenience and a comfort to Mr. Bennett, he has not made a sufficient demonstration that the use of the Butzel, Keidan firm was a necessary addition of attorneys to the fee petition proceedings. Nor has Mr. Bennett demonstrated that there was not a great amount of duplication caused by conferences between Larry Bennett and Richard Saslow or Bruce Sendek of the Butzel, Keidan firm, or between Messrs. Saslow and Sendek. At numerous discovery sessions, strategy and preparation sessions, and court hearings, both Mr. Bennett and either Mr. Saslow or Mr. Sendek would appear Mr. Bennett has not demonstrated the necessity for this duplication of attorney time. Mr. Bennett had expertise in the history and proceedings of the *Hadix* case, and particular knowledge with respect to his own personal involvement as an attorney in this case. It is duplicative for the Butzel, Keidan attorneys to spend time to gain this information from Mr. Bennett. The hours of the Butzel, Keidan attorneys becoming familiar with the case are being sought by Mr. Bennett even though he has excluded his own hours on this. Mr. Bennett

has not made a sufficient demonstration that any time was appropriate and necessary for this re-education process.

The billings do show certain hours in which Butzel, Keidan did legal work for Mr. Bennett that he would otherwise have had to do on his own behalf, for which he could be compensated under § 1988 in this fee petition.

Pat Streeter's retention of Ralph Sirlin to help prepare her testimony was also not demonstrated to have been necessary to the presentation of her fee petition.

This Special Master Report will not make detailed findings with respect to each time entry that is being found duplicative and unnecessary. The finding of reasonable and necessary hours on the fee petition for time that petitioner Bennett would have had to spend is made on the following criteria.[16] These criteria attempt to limit these costs to those portions of the Butzel, Keidan bill which provided services that Mr. Bennett otherwise would have reasonably and necessarily provided himself. In reviewing both the Butzel, Keidan and the Larry Bennett time billings, the finding excludes all meetings between Mr. Bennett as client and Butzel, Keidan as his attorneys as being unnecessary and duplicative. If Mr. Bennett had presented his own fee petition, much of the information communicated in these meetings would have been unnecessary since he would have had that knowledge at his own command.

Secondly, this fee petition, though elaborate in time and amount of facts involved, was not either factually so complicated nor involved any sufficiently complicated legal issues as to warrant the necessity for two, three, and even four Butzel, Keidan attorneys being involved in representing the Bennett petition alone. Accordingly, the findings exclude all inter-office attorney to attorney communication as being duplicative. The findings further exclude the billable hours either for the attorney from Butzel, Keidan or for Mr. Bennett for time preparing for or being involved in depositions or court hearings. Generally the findings include as reasonable the hours for Butzel, Keidan for preparation and the taking of the

16 The worksheets and notations applying these criteria are in the Bennett portion of the Judge's File on this fee petition.

depositions of Mr. Berlin and the assistant attorneys general involved in the *Hadix* and *U.S.A.* cases. No hours for Mr. Bennett or other petitioners are allowed for these depositions. The findings allowed the hours of Larry Bennett for preparation and time at court proceedings involved in these fee petitions and, accordingly, excluded any billings from Butzel, Keidan that were duplicative for these matters in court.

Reductions have also been made on the briefing done by Butzel, Keidan on the issues of attorney's fees, the importance of settlement, attorney's fees to be given to attorneys hired to pursue attorney's fees petitions, and enhancement. While petitioners are prevailing on the issue of receiving attorney's fees, they are not receiving the fee levels nor the degree of enhancement that they seek, nor is Mr. Bennett receiving more than a portion of his claim for attorney's fees for the Butzel, Keidan firm he hired. Accordingly, the petitioners are not prevailing parties on all issues upon which they submitted briefs in this fee petition. Petitioners do not prevail on enhancement for the quality of representation, nor the excellence of the results achieved. While an enhancement is being recommended for certain limited portions of the times submitted on the risk issue, the allowance and payment of this enhancement is dependent upon the outcome of the Supreme Court case to be decided this term in *Delaware Valley*.

Fees and costs are being permitted as reasonable and necessary for the taking of the December 20, 1985, deposition of Steve Berlin. No time is also being allowed for either Mr. Bennett or for the Butzel, Keidan firm for efforts to continue and take the deposition of Steve Berlin on December 30, 1985. The necessity of a continuation, which evidence this Special Master excluded as not being in compliance with the court rules on stipulations for telephonic depositions, was necessitated solely by the inadvertence of the petitioners' counsel in supplying Mr. Berlin with an incomplete copy of the *U.S.A.* decree that omitted its State Plan. The defendants should not be required to pay attorney's fees in efforts to remedy this problem.

16. Judith Magid

Judith Magid assisted Larry Bennett as lead counsel in the *Hadix* case until October 1984 when her illness necessitated a lesser role. Ms. Magid had practiced law since 1974. She had an excellent reputation as a skillful and diligent civil rights attorney. She had extensive experience in prisoner litigation and had developed a certain national recognition in this field. She had testified, written, lectured, and consulted on prisoners' rights. She had had few clients billed at hourly rates, though she had billed at $100 per hour. She had received attorney's fee awards figured at $100 per hour and one settled for a 10% reduction for duplication, using a $125 per hour base rate. Ms. Magid sought $150 per hour as a base rate. A reasonable hourly rate for Judith Magid for her services on the merits of *Hadix* is $120 per hour.

Ms. Magid incurred the following expenses which were reasonable and necessary to preparation for litigation and the successful negotiated Consent Judgment in *Hadix*:

Travel expenses related to the Hadix litigation	$782.85
Long distance Telephone	159.88
Photocopying	53.00
TOTAL	$995.73

It was necessary for the Magid petition to be presented by Patricia Streeter representing the Magid estate. The hours for this are properly allocated to the Streeter petition discussed below.

17. Thomas Loeb

Thomas Loeb was brought into the *Hadix* litigation in May of 1981. Mr. Loeb has practiced law since 1976. He is experienced as a trial attorney and has substantial experience in civil rights litigation. Mr. Loeb has lectured on civil rights litigation and taught criminal trial advocacy. Mr. Loeb was principally involved when it was believed *Hadix* would go to

trial. His relative involvement in *Hadix* was substantially reduced after the January 28, 1983, pretrial conference when a settlement was proposed. Mr. Loeb did not have the degree of responsibility or involvement in *Hadix* as did attorneys Bennett or Magid. Mr. Loeb testified that he has in the past routinely billed at $125 per hour which he seeks in his fee petition. A reasonable hourly rate for the services Thomas Loeb performed on the merits of *Hadix* is $110 per hour.

Unlike other petitioners, Mr. Loeb has not submitted by the June 9, 1986, cut-off on all fee petition submissions any itemization or other breakdown of the $3,195.17 in costs he claims. Mr. Loeb represented himself on the fee petition and has submitted a supplemental itemization of hours that are found to be necessary and reasonable except for three hours attending the Bennett deposition.

18. Michael Barnhart

Michael Barnhart became involved in *Hadix* shortly before the anticipated trial in early 1983. He has been involved in law practice since 1968. While he had substantial civil rights litigation and negotiation experience, Mr. Barnhart had no substantial prisoners rights litigation experience prior to *Hadix*. Mr. Barnhart was involved in the psychiatric care of prisoners in the negotiations and also served as backup to Patricia Streeter on fire safety and to Larry Bennett on the physical plan. Mr. Barnhart's responsibilities and involvement in the case were less than attorneys Bennett and Magid. Mr. Barnhart has little of his practice billed at an hourly rate though he presently bills at $125 per hour. He has been awarded $100 per hour for a small consulting role in *NAACP v. Detroit Police Department* and seeks $150 per hour for his services in *Hadix*. A reasonably hourly rate for Mr. Barnhart's legal services on the merits of *Hadix* is $110 per hour.

Mr. Barnhart's supplemental affidavits and itemizations for hours expended on the fee petition are found to be reasonable and necessary excepting 12 hours spent attending other attorneys' depositions which were not necessary and were duplicative of other petitioner's time.

Mr. Barnhart has incurred the following expenses which were reasonable and necessary to the *Hadix* litigation:

Xeroxing	$ 133.60
Federal Express	11.00
Long Distance	243.00
Consultant Expert to Counter Defendants' Expert re: State Bar Survey	225.00
TOTAL	$ 612.60

The $75 copy of his own deposition was a convenience but not a necessary expense. Mr. Barnhart has not sought compensation for attorney Jeanne Mirer of his office who participated in the hearing of this matter.

19. Patricia Streeter

Patricia Streeter became involved in *Hadix* in December of 1982. Ms. Streeter was admitted to practice in 1979. Prior to *Hadix*, Ms. Streeter practiced primarily criminal law and had little civil litigation experience outside divorce and probate work and some plaintiff's personal injury work. Throughout the *Hadix* litigation Ms. Streeter's experience in prisoner litigation and her responsibilities have increased. In the final Litigation *Phase III*, only, Larry Bennett surpassed Ms. Streeter in time involvement in Hadix. While Ms. Streeter does only a limited practice on an hourly rate, she charges $100 an hour for non-complex cases and$125 per hours for complex cases. She seeks $100 per hour in her petition based on a $90 average base rate plus a $10 enhancement due to the case complexity. A reasonable hourly rate for Ms. Streeter's legal services on the merits of *Hadix* is $95 per hour.

Ms. Streeter has also filed a detailed itemized affidavit for costs, primarily for photocopying, long distance telephone calls, postage, and certain prisoner publications relevant specifically to the *Hadix* litigation and not an ordinary attorney library item. These costs are found to have been reasonable and necessary to obtaining the *Hadix* Consent Judgment and are as follows:

1983	$ 345.85
1984	651.57
1985 through May 15	437.50
TOTAL	$1,434.92

Ms. Streeter has filed a supplemental affidavit of hours spent for herself and Ms. Magid on the fee petition which is found to be reasonable and necessary except for 7.4 hours attending the Bennett and Berlin depositions that are duplicative. She was represented during her testimony at the fee hearing by Jeanne Mirer, for whom she does not seek compensation. As noted above in 15, the attorney time of Ralph Sirlin, who prepared her for her testimony, have not been demonstrated to have been a necessary expense.

20. Prison Legal Services:

Petitioner Streeter requests in her application $5,914.60 in costs to Prison Legal Services of Michigan, Inc., including $3,362.90 for copying plaintiffs' documents and $301.70 for hours copying and $2,250.00 for 30 hours of attorney time of research on an Access to Courts injunction. On December 22, 1981, plaintiffs petitioned this Court to order that the state preserve the availability of Prison Legal Services, which injunction was granted January 15, 1982. It is recommended that this cost not be reimbursed since it would appear that the state has already paid for the staff time and xerox services of Prison Legal Services under the injunction.

21. Hourly Rates for Fee Petition Work

To arrive at "a fair and equitable fee", the Sixth Circuit has indicated in several opinions that it is desirable, whenever possible, to vary the hourly rate awarded depending upon the type of service being provided. *Northcross, supra*, 611 F.2d at 638. While requiring a sophisticated knowledge of the case facts, law and history, the legal work for preparing and pursuing a fee petition in this case is less complicated and demanding than the legal work on the merits of this civil rights claim.

The factual and legal matters involved, though extensive in quantity, are far more manageable than the legal and factual issues involved in seeking court intervention on constitutional grounds to remedy the problems at SPSM-CC. Fee petitions are, in substantial part, accounting matters. In this case, substantial briefings were involved on prevailing party status and questions of waiver due to the positions asserted by defense counsel. Yet, these issues were more easily resolved given the trial judge's familiarity with the case than would be issues on the merits. After the Court's resolution of prevailing party status and waiver, substantial time was spent on the less intellectually demanding tasks of determining appropriate market rates for attorneys and the hours to permit in the fee petition. To the extent there was a great deal of data involved, this factor will be reflected in the additional number of hours for which fees are being awarded. A fair hourly rate for all attorneys' hours involved in the fee petition is $90 per hour. This rate is higher than the median Michigan attorney rate Dr. Stiffman found in his 1984 survey and is likely higher than the average median rate adjusted for inflation to 1986. It is the median rate Dr. Stiffman found for federal litigation specialists. A differential on billable rates for work on the merits of the case and on fee petition work is appropriate not only because of the substantially different nature of the issues involved and the requisite skills and experience needed to handle them, but also courts use of varied rates will discourage unnecessary preparation, discovery, and litigation on the fee petition issue that might be encouraged if the slightly higher "merits issues" rates were to be used.

The hours expended on the fee petition also have not involved substantial periods of delay. Nor did they involve a sufficient contingency or risk factor for which any enhancement is warranted. While the defendants put up a vigorous defense to any fee petitions being permitted, it quickly became clear from the Court's rulings on the prevailing party and waiver issue that the issue to be resolved was not whether the petitioners would receive any fees in this case, but merely how much they would receive.

Even at this reduced hourly rate, the recommended attorney's fees for work done on the fee petition are an amount in excess of $75,000.

IV. RECOMMENDATIONS

A. Adjustment of Fees of the Lodestar in Light of Superior Representation, Complexity, Degree of Success or Lack Thereof:

1. Enhancement: As noted in section I of this opinion, *Delaware Valley* clarifies that upward adjustments are only to be provided in the most extraordinary of circumstances. The superior quality of attorneys' services in the case and the degree of success are ordinarily subsumed in the hourly rates and in the number of hours involved in a case in arriving at the lodestar figure. In the present case, the quality of counsel and their superior services are adequately measured by their hourly rates, and the complexity of the issues and the degree of success are appropriately reflected by the number of hours utilized in determining the lodestar. Accordingly, it is recommended that no upward adjustment be made to the lodestar figure based either on superior services of counsel, complexity, or upon degree of success.

2. Downward Adjustment: While the parties have entered into a stipulation regarding reduction of the number of attorney hours claimed, defendants continue to assert that the fee award should be limited, if not altogether precluded, by the limited degree of success achieved by plaintiffs. They assert (1) that the success achieved was not what plaintiffs sought -- prohibition of housing inmates at SPSM-CC -- and (2) that the success achieved was insignificant since it was a reiteration of what had already been achieved in *U.S.A.*

For the reasons set forth in the findings, it is recommended that no downward adjustment be made to the lodestar either because the relief obtained is not identical to that initially sought nor because of the outcome of the *U.S.A.* case. The effects of parallel litigation in *U.S.A.* is considered in limiting the enhancement recommended for risk of loss.

B. Enhancement for Risk of Loss:

As noted in Finding 6 above, there was a substantial degree of risk of loss during *Hadix* Litigation Phase I (October 1980 to

January 28, 1983) and a reduced risk of loss in Litigation Phase II (January 29, 1983 to June 14, 1984). Only after the settlement was agreed to in concept, on or about June 14, 1984, did the risk of loss end. Determining the risk factor is one of the elements of a fee determination least amenable to precise determination. For this reason, the Special Master has reviewed other cases awarding a contingency enhancement for risk of loss.[17]

While difficult to determine, a risk enhancement is not an arbitrary bonus but rather a real component of a reasonable fee to account for the contingency of no recovery of any fees. The recommended risk enhancement takes into consideration the relative novelty and difficulty in the use of the Constitution to intrude into the administration of state prisons as well as courts' reluctance to do so in other than extreme situations. Account is also taken of the complexity of the facts and the vigorous and tenacious defense mounted by the Michigan Attorney General's office.

While the defense has argued that the parallel litigation in *U.S.A.* should defeat prevailing party status or diminish the significance of the outcome in *Hadix*, courts have more commonly considered parallel litigation, especially that by the

17 *Burger v. CPC International, Inc.*, 76 F.R.D. 183 (S.D.N.Y. 1977)
(30% increase on straight billable time to compensate for risk of litigation)

Barnett v. Pritzker, 73 F.R.D. 430 (S.D.N.Y. 1977)
(33% increase as "risk factor bonus" on time spent on merits -- but only straight hourly rate for time spent in preparing fee application and administration of settlement since no more "risk of litigation")

Weiss v. Drew National Corp., 465 F. Supp. 548 (S.D.N.Y. 1979)
(15% risk factor bonus)

Blank v. Talley Industries, Inc., 390 F. Supp. 1 (S.D.N.Y. 1975)
(50% increase -- for risk, skill and experience, complexity, results)

Munsey Trust v. Sycor, Inc., 457 F. Supp. 924 (S.D.N.Y. 1978)
(30% increase as 'risk factor bonus" only to time spent on the merits. Straight hourly fee for time spent on fee petition and lower hourly rate for time spent on administration of settlement)

Barr v. WUI/TAS, Inc., 1976-1 Trade Cases ¶ 60725 (S.D.N.Y. 1976)
(20% increase for risk, results, novelty and difficulty of issues)

In re Master Key Antitrust Litigation, 1978-1 Trade Cases ¶61,887 (D.Conn. 1977)
(up to 100% increase for risk)

government, in determining risk of loss. As noted in findings 4 and 6, *Hadix* preceded the *U.S.A.* in time, and only in *Hadix* Litigation Phase II did plaintiffs obtain the Justice Department report in *U.S.A.* Similarly, it was in *Hadix* Litigation Phase II that the Justice Department brought its CRIPA suit in *U.S.A.* This parallel *U.S.A.* litigation did reduce the risk of loss in *Hadix* in Litigation Phase II.

In light of the above considerations, it is recommended that petitioners be awarded a 30% contingency enhancement for risk of loss for all hours of service in Litigation Phase I, and a 15% contingency enhancement for all hours of service in Litigation Phase II. It is further recommended that payment of the contingency enhancement portion of the fee award be deferred until the *Supreme Court* decides the § 1988 risk issue this term in *Delaware Valley*, but that interest under 28 U.S.C. § 1961(a) be allowed from the date of this Court's order. If the Supreme Court in *Delaware Valley* rejects § 19[illegible], this enhancement and any interest will, of course, not be allowed.

C. Individual Awards of Attorney's Fees and Costs:

It is recommended that the following attorney's fees and costs be awarded:

Attorney: LARRY BENNETT

ATTORNEY'S FEES:

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	735.80	x 935 = 687.97	x $125/hr = $85,996.25	x 1.3 = $111,795.13
Litigation Phase II (Through 6/14/84)	915.30	855.81	x $125/hr = $106,976.25	x 1.15 = $123,022.69
Litigation Phase III (After 6/14/84)	321.0	300.14	x $125/hr = $37,517.50	x 1.0 = $37,517.50

Hours Reported In Original Fee Petition Devoted to Fee Petition	22.5	21.04	x $90/hr = $1,893.60	x 1.0 = $1,893.60
Supplemental Billings for Hours on the Petition Itself	185.80	Not Reduced 185.80	x $90/hr = $16,722.00	x 1.0 = $16,722.00
TOTAL	2,180.40	2,050.76	$249,105.60	$290,950.92
COSTS:			$ 35,045.63	$ 35,045.63
TOTAL ATTORNEY' S FEES AND COSTS			$284,151.23 Without Risk Enhancement	$325,996.55 With Risk Enhancement

Outside Counsel Retained by Larry Bennett to Work on Fee Petition

Attorney	Hours Worked	Times Hourly Rates
Richard Saslow Bruce Sendek	101.80	x $90/hr = $9,162.00
Dorien Kelly	14.00	1.40 hrs @ $40/hr + 12.60 hrs @ $60/hr $812.00
M. Lucile Giddings (paralegal)	1.00	x $40/hr = $40.00
Dennis Egan	0.8	x $90/hr = $72.00

Attorney: IUDITH MAGID

ATTORNEY'S FEES:

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	304.75	284.94	x $120/hr = $34,192.80	x 1.3 = $44,450.64
Litigation Phase II (Through 6/14/84)	596.90	558.10	x $120/hr = $66,972.00	x 1.15 = $77,017.80
Litigation Phase III (After 6/14/84)	170.20	159.14	x $120/hr = $19,096.80	x 1.0 = $19,096.80
Hours Reported In Original Fee Petition Devoted to the Fee Petition	6.25	5.84	x $90/hr = $525.60	x 1.0 = $525.60
Supplemental Filings for Hours on the Fee Petition	0	0	0	0
TOTAL ATTORNEY'S FEES	1,078.10	1,008.02	$120,787:20	$141,090.84
COSTS:			$ 995.73	$ 995.73
TOTAL ATTORNEY'S FEES AND COSTS			$121,782.93 Without Risk Enhancement	$142,086.57 With Risk Enhancement

Attorney: THOMAS LOEB

ATTORNEY'S FEES:

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	239.10	223.56	x $110/hr = $24,591.60	x 1.3 = $31,969.08
Litigation Phase II (Through 6/14/84)	172.20	161.01	x $110/hr = $17,711.10	x 1.15 = $20,367.77
Litigation Phase III (After 6/14/84)	77.35	72.32	x $110/hr = $7,955.20	x 1.0 = $7,955.20
Hours Reported in Original Fee Petition Devoted to the Petition Itself	8.6	8.04	x $90/hr = $723.60	x 1.0 = $723.60
Supplemental Filings for Hours on the Fee Petition	56.95	Recommended Reduction 53.95	x 90/hr = $4,855.50	x 1.0 $4,855.50
TOTAL ATTORNEY'S FEES	554.20	518.88	$55,837.00	$65,871.15
COSTS:			$ -0-	$ -0-
TOTAL ATTORNEY'S FEES AND COSTS			$55,837.00 Without Risk Enhancement	$65,871.15 With Risk Enhancement

Attorney: MICHAEL BARNHART

ATTORNEY'S FEES:

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	11.50	10.75	x $110/hr = $1,182.50	x 1.3 = $1,537.25
Litigation Phase II (Through 6/14/84)	244.40	228.51	x $110/hr = $25,136.10	x 1.15 = $28,906.52
Litigation Phase III (After 6/14/84)	120.40	112.57	x $110/hr = $12,382.70	x 1.0 = $12,382.70
Hours Reported in Original Fee Petition Devoted to Petition Itself	12.0	11.22	x $90/hr = $1,009.80	x 1.0 = $1,009.80
Supplemental Filings for Hours on the Fee Petition	205.4	Recommended Reduction 193.40	x $90/hr = $17,406.00	x 1.0 = $17,406.00
TOTAL ATTORNEY'S FEES	593.70	556.45	$57,117.10	$61,242.27
COSTS:			$ 612.60	$ 612.60
TOTAL ATTORNEY'S FEES AND COSTS			$57,729.70 Without Risk Enhancement	$61,854.87 With Risk Enhancement

Attorney: PATRICIA STREETER

ATTORNEY'S FEES;

	Hours Claimed	Reduced 6.5% Per Stip.	Times Hourly Rate	Risk Enhancement
Litigation Phase I (Through 1/28/83)	61.50	x .935 = 57.50	x $95/hr = $5,462.50	x 1.3 = $7,101.25
Litigation Phase II (Through 6/14/84)	523.20	x .935 = x 489.19	$95/hr = $46,473.05	x 1.15 = $53,444.01
Litigation Phase III (After 6/14/84)	x .935 = 276.15	258.20	x $95/hr = $24,529.00	x 1.0 = $24,529.00
Hours Reported in Original Fee Petition Devoted to Petition Itself	24.0	x .935 = 22.44	x $90/hr = $2,019.60	x 1.0 = $2,019.60
Supplemental Filings for Hours on the Fee Petition	349.0	Recommended Reduction 341.60	x$90/hr = $30,744.00	x 1.0 = $30,744.00
TOTAL ATTORNEY'S FEES	1,233.85	1,168.93	$109,228.15	$117,837.86
COSTS:			$ 1,434.92	$ 1,434.92
TOTAL ATTORNEY'S FEES AND COSTS			$110,663.07 Without Risk Enhancement	$119,271.78 With Risk Enhancement

D. Interest:

It is further recommended that interest as provided in 28 U.S.C. § 1961(a) be allowed on this award of fees and costs from the date of the Court's order.

Objections and Notice of Filing:

This Special Master's Report is being filed with the Clerk of the Court on this 24th day of September 1986. Objections to this Special Master's Report and Recommendation shall be made within ten (10) days of service of this notice of filing and the Report and Recommendation by filing with the Clerk of this Court and by serving a copy on the other parties. Pursuant to Fed. R. Civ. P. 53(e) (2) application to the Court must be made for action upon this Report and Recommendation, and any objections shall be by motion and notice as prescribed in Fed. R. Civ.P. 6(d).

STEVEN D. PEPE
UNITED STATES MAGISTRATE

Dated: September 24, 1986
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, *et al,*

Plaintiffs,

v

No. 80-CV-73581
Hon. John Feikens

PERRY JOHNSON, *et al,*

Defendants.
_____/

ORDER REGARDING MONITORING FEES

The Plaintiffs' have filed a motion for monitoring fees and costs which shall be resolved as to attorneys Patricia A. Streeter and Michael Barnhart in the following amounts:

	Attorney Time	Costs	Total
Michael Barnhart	$ 28,072.00	$ 792.38	$28,864.00
Patricia Streeter	$ 34,276.95	$3,947.29	$38,224.00

These amounts are based upon the following provisions which shall also apply to future monitoring requests, which shall be billable semi-annually:

1. Hourly Rate: $110 for Michael Barnhart
   $ 95 for Patricia Streeter

2. USA Hours: There will be no reduction of hours expended amicus in *USA v. Michigan.*

3. Duplication: There will be no reduction for duplication for attorney time, provided that counsel continue to divide responsibilities.

4. Travel Time: Travel time will be billed at the stated hourly rate.

5. Costs

a. Mileage: There will be no billing for mileage where travel time has been billed;

b. Photocopies: Photocopies will be paid at a rate of $.10 per copy.

c. Office Supplies: No amounts will be requested for costs attributable to office supplies.

Future billings shall be itemized to describe hours and costs. Defendants shall have fifteen (15) days to object to documentation of hours or costs. For any objections that cannot be resolved within thirty (30) days after billing, an immediate hearing shall be requested. If no objections are made, payment shall be made within sixty (60) days of billing.

IT IS SO ORDERED.

Date: Nov. 19, 1987

John Feikens
District Court Judge

APPROVED AS TO FORM
AND SUBSTANCE:

ELAINE B. FISCHHOFF
Attorney for Defendants

PATRICIA A. STREETER
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al,

Plaintiffs, File No. 80-CV-73581-DT
HONORABLE JOHN FEIKENS

v

PERRY M. JOHNSON, et al,

Defendants.
_____/

STIPULATION

The parties, through their respective counsel hereby stipulate and agree:

1. Presently pending before this Court is Plaintiffs' Motion for Attorney Fees and Costs.

2. As indicated in the attached letter dated April 17, 1992 from Susan Przekop-Shaw to Patricia Streeter and Michael Barnhart, all issues raised by Patricia Streeter and Michael Barnhart in this Motion have been resolved in the manner described in the letter. Accordingly, the parties request that the Motion be dismissed.

3. Two of the matters agreed upon in the April 17, 1992 letter require a modification of the Order Regarding Monitoring Fees dated November 19, 1987, attached hereto.

4. The parties request that this Court enter the attached proposed Amended Order Regarding Attorney Fees and Costs.

Date: April 22, 1992

MICHAEL BARNHART

PATRICIA STREETER
Counsel for Plaintiffs

/88/8801698/STIP2

Date: April 17, 1992

SUSAN PRZEKOP-SHAW
Assistant Attorney General
Counsel for Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al,

Plaintiffs, File No. 80-CV-73581-DT

v HONORABLE JOHN FEIKENS

PERRY M. JOHNSON, et al,

Defendants.
_____/

AMENDED ORDER REGARDING
ATTORNEY FEES AND COSTS

This Court entered an Order Regarding Monitoring Fees on November 19, 1987. The parties have stipulated that they wish to amend that portion of the November 19, 1987 Order that addresses future fees and costs. Having reviewed the stipulation of the parties,

IT IS ORDERED that the hourly rate for Michael Barnhart shall be $150.00 per hour, effective January 1, 1992. The hourly rate for Patricia Streeter shall be $135.00 per hour, effective January 1, 1992. However, the parties have reserved the decision as to the applicable hourly rate for time expended prior to January 1, 1992 on certain issues deferred by the parties, until such time as they are raised to the Court.

IT IS FURTHER ORDERED that billings shall be submitted semi-annually and shall be itemized to describe hours and costs. Defendants shall have fifteen (15) days to object to Plaintiffs' billings. Plaintiffs shall file a motion with the Court within thirty (30) days of receipt of Defendants' objections. Failure to file within said thirty (30) days shall constitute a waiver of any challenge to the objections. If no objections are made, payment shall be made within Sixty (60) days of billing.

Date: April 24, 1992

HONORABLE JOHN FEIKENS
UNITED STATES DISTRICT
JUDGE

APPROVED AS TO FORM
AND SUBSTANCE:

SUSAN PRZEKOP-SHAW
Assistant Attorney General
Counsel for Defendants

MICHAEL BARNHART
Counsel for Plaintiffs

PATRICIA STREETER
Counsel for Plaintiffs

88/8801689/ORDER2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, *et al.*,

Plaintiffs,

v.

Case No. 80-CV-73481
Hon. John Feikens

PERRY JOHNSON, *et al.*,

Defendants.
_____/

OPINION AND ORDER

Before me are the petitions for fees and costs of attorneys Michael Barnhart, Patricia Streeter, Deborah LaBelle and Neal Bush for services rendered to the plaintiff class.

I note that defendant State paid Mr. Barnhart $117,062.50 and Ms. Streeter $65,553.31 for work done as monitors for the second half of 1992.

Mr. Barnhart seeks an additional $16,847.50 in costs and fees. This represents 125.65 hours of work to be paid at the rate of $150 per hour, together with facsimile costs of $125. Only 49.4 of these hours relate to work performed in the period of July to December, 1992. The remaining 76.25 hours and the costs relate to work performed from July, 1990 through June, 1992. The parties agreed to defer disputes over these older fees and costs until now.

Defendants object to paying any of these costs and fees for a variety of reasons. In particular, they object to paying Mr. Barnhart for any time he spent conferring with Deborah LaBelle, Neal Bush, Sandra Girard and/or Elizabeth Alexander. Ms. LaBelle and Mr. Bush, both attorneys, have provided some legal services to the plaintiff class at the request of Mr. Barnhart and Ms. Streeter. Sandra Girard is the Director of Prison Legal Services. Elizabeth Alexander is an attorney assisting plaintiffs in their role as amicus in *United*

States v. Johnson, before Judge Enslen in the Western District of Michigan. Ms. Alexander is primarily responsible for mental health issues.

Defendants also object to time Mr. Barnhart spent addressing prisoner transfer and college programming issues. They argue that prisoners do not have a right to avoid transfer to another facility, and that college programming is not an issue in this case.

Ms. Streeter seeks an additional $1,613.44 in costs and fees to which defendants object. This represents 11.75 hours of work at the rate of $135 per hour, and $27.19[1] in telephone costs. Only 3.25 hours are from the current billing period, June through December, 1992. The remaining 8.5 hours and the telephone costs were previously deferred. Defendants object to all of these hours for reasons similar to those stated for Mr. Barnhart.

Both Deborah LaBelle and Neal Bush submit petitions for attorney fees for the first time. As noted, these attorneys became involved with the case at the request of Barnhart and Streeter. I was not consulted. Ms. LaBelle has concentrated her efforts in two areas of this litigation, out-of-cell activities and the SDT break-up process. Mr. Bush has taken the lead in the C. "Pepper" Moore retaliation dispute. His other involvement with the case has been sporadic.

Ms. LaBelle seeks $26,565 in fees, representing 177.1 hours of work at the rate of $150 per hour. Roughly half of this time (87.45 hours) involves work from July, 1992 through June, 1992. The remaining 89.65 hours are for work performed in the second half of 1992.

Mr. Bush asks for $21,144.30. $13,950 of this amount, representing 93 hours of work, is for the time spent on the

[1] This figure is in error. One phone call made on 12/12/91 ($7.50) as billed twice. The total should be $19.69, making the corrected grand total only $1,605.94.

Pepper Moore retaliation issue.[2] Although plaintiffs agreed to defer resolution of this portion of the fee dispute until the retaliation claim is resolved, I prefer to address it at this time. Of the remaining time logged by Mr. Bush, 46.3 hours represent work performed before July, 1992. Only .8 hour represents work performed in the last half of 1992. Mr. Bush asks for compensation at the rate of $150 per hour. He also seeks $129.30 for photocopying costs.

Defendants object to payment of any fees to either LaBelle or Bush (with the possible exception of hours spent on the Pepper Moore contempt motion), for the reason that their services are duplicative and unnecessary. Defendants believe that only two attorneys are needed for fair and adequate representation of the plaintiff class. They also argue that fewer attorneys are needed now than before, because the case is in a monitoring phase.

I am sympathetic to the defendants' argument that only two attorneys are needed for the plaintiff class. However, I do not agree that all of the work performed by Ms. LaBelle and Mr. Bush is duplicative or unnecessary. Furthermore, I believe it would be unfair to refuse payment simply because my permission was not secured before these attorneys became involved in the case. Although I have the power and responsibility to approve or disapprove of attorneys designated to represent plaintiffs in a class action, I believe all parties -- plaintiffs, defendants and the court -- must take some responsibility for addressing the question of the need for additional attorneys before Bush and LaBelle logged a significant number of hours.

However, if in the future plaintiffs believe the services of attorneys other than Barnhart and Streeter are needed, prior approval from the court for such activity must be secured. My

[2] The exhibit attached to Plaintiff's Reply Brief in Support of Plaintiffs' Petition for Attorney Fees and Costs incorrectly includes two entries representing work related to the Pepper Moore issue. These entries are dated 04/02/91 and 05/07/91, and are for 1.2 and 1.0 hours respectively. As a result of this error, some of the figures quoted in plaintiffs' briefs are incorrect.

approval will be conditioned on demonstrated need for additional counsel, both as to hours required and the nature of the work to be performed.

I now take up the individual fee requests. Michael Barnhart should be paid for his involvement in prisoner transfer and college programming issues. These pursuits are sufficiently related to the central *Hadix* dispute to warrant compensation. Furthermore, he should receive payment for some, but not all, of his consultations with Deborah LaBelle, Neal Bush and Sandra Girard.

I do not require defendants to pay Mr. Barnhart for his consultations with Elizabeth Alexander. However, I note that Judge Enslen of the Western District of Michigan has indicated that he will entertain a petition for attorney fees from the plaintiff class. Because Ms. Alexander's association with the case deals exclusively with the mental health issues, which are being addressed by Judge Enslen in *United States v Johnson*, I do not believe Barnhart's discussions with her are directly related to *Hadix*. Mr. Barnhart's facsimile costs are also associated with Ms. Alexander's role in *United States v. Johnson*, and should not be paid.[3]

In addition, I do not require defendants to compensate Mr. Barnhart for his consultations with Ms. LaBelle on the SDT/break-up process. Because the process is primarily controlled by the SDC committee, I do not believe that the involvement of two attorneys is needed. However, he must be compensated for his consultations with Ms. LaBelle on out-of-cell activities. His consultations with Neal Bush and Sandra Girard are also compensable.

Finally, I note that Mr. Barnhart seeks an hourly rate of $150 for all of these disputed hours. However, before January 1, 1992 Mr. Barnhart was paid at the rate of only $110 per hour. All hours logged before January 1, 1992 for which I order

[3] I note that in the past defendants have paid plaintiff's attorneys for their work as amicus in *United States v. Johnson*. In the future all fees associated with that case should be addressed to Judge Enslen.

payment should be paid at $110 per hour. Only 1992 hours should be compensated at $150 per hour. A detailed list of the hours for which Mr. Barnhart should be paid is attached to this opinion as Appendix A [text of Appendix omitted]. He is entitled to a total of $8,370.50.

The number of disputed hours involving Ms. Streeter is relatively few. As with Mr. Barnhart, she should not be compensated for time spent communicating with Elizabeth Alexander. All other hours must be compensated. Ms. Streeter's rate of pay for pre-1992 work should be $95 per hour, and for 1992 work, $110 per hour. *See* Appendix B [text of Appendix omitted] for a detailed list of hours and costs to be paid. She is entitled to a total of $734.69.

Ms. LaBelle should be compensated for her involvement in out- of-cell activities, but not for the SDT and the break-up process. Her rate of pay should correspond to the rate she receives for her work in *Glover v Johnson*.. For work performed since January, 1992 she should receive $150 per hour. Or work prior to that date, she should receive $135 per hour. *See* Appendix B [text of Appendix omitted] for a detailed list of the hours for which Ms. LaBelle should be paid. She is entitled to a total of $10,929.00.

Finally, I address Mr. Bush's fee request. Although the Pepper Moore dispute is not fully resolved, I believe plaintiffs are entitled to attorneys fees for this portion of the litigation. The issue of retaliation is significant, and an appropriate area of concern for the plaintiff class. Consequently, Mr. Bush should be paid for all hours logged in the Pepper Moore dispute.

Furthermore, I find that he should be compensated at the same rate of pay as Mr. Barnhart because of his role as lead counsel in this portion of the case. Mr. Bush spent 43 hours before 1992 working on this issue and 50 hours during 1992. He should be paid $110 per hour for the pre-1992 work ($4,730), and $150 per hour for work performed in 1992 ($7,500).

Mr. Bush also seeks compensation for work in other areas of this case. Most of these hours should not be

compensated, because I find his assistance was not needed. He did, however, make a contribution during September of 1990 when he was called upon to step in for Mr. Barnhart and Ms. Streeter. Actions taken by defendants regarding Jackson Community College programming required a quick response from plaintiffs' counsel. In particular, I refer to time entries dated 09/13/90 for 2.4 hours, 09/23/90 for 2 hours, 09/24/90 for 2 hours, and 09/25/90 for 11.5 hours. Mr. Bush should be compensated for exactly half of the time he spent on these activities, a total of 8.95 hours. This should be paid at the rate of $110 per hour, for a total of $984.50. Mr. Bush should also be compensated for $129.30 in photocopying costs.

The grand total for Mr. Bush, including Pepper Moore retaliation, costs, and other compensable work is $13,343.80.

I emphasize again that in the future any work done on behalf of the plaintiff class by attorneys other than Patricia Streeter and Michael Barnhart must be pre-approved by this Court.

IT IS SO ORDERED.

JOHN FEIKENS
UNITED STATES
DISTRICT JUDGE

Dated: June 14, '93

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, *et al.*,

Plaintiffs,

v.

PERRY M. JOHNSON, *et al.*,

Defendants.
_____/

Civil Action No.
80-73581
Hon. John Feikens

OPINION AND ORDER REGARDING
PLAINTIFFS' MOTION FOR ATTORNEY FEE

Attorneys for the plaintiff class have petitioned for an award of attorneys fees for the period of July 1, 1995 through December 31,1995. Defendants initially object to the payment of the fees, claiming that the Prison Litigation Reform Act of 1995 ("the Act" or "PLRA"), which became effective April 26, 1996, is retroactive in its application to attorney fees in cases such as this. Attorneys for the plaintiff class contend in opposition that that Act is not retroactive, is prospective, and does not, therefore, affect the petition for fees in the period covered.

It is necessary for me, therefore, to make a determination whether that Act has retroactive application to attorney fees.

The intent of Congress for the application of the attorney fees provision of PLRA is not clear. Plaintiff class argues that Congress intended prospective application of the attorney fees provisions of the PLRA since only one of the ten sections of PLRA explicitly provides for its application to pending cases. As evidence, they assert that the attorney fees provisions were included in the section applying to pending cases when the bill was passed by the House of Representatives, but transferred to another section before the bill was signed into law. Plaintiff

class' inference does not constitute a plain showing of congressional intent.

If a statute were to operate retroactively, there is a presumption that it does not govern absent congressional intent favoring such a result. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994). To determine whether a statute operates retroactively,

> The court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 114 S. Ct. at 1499.

Defendants first allege that PLRA requires that the plaintiffs' class attorneys return $12,339.38 for fees paid to them for the period from July 1,1995 through December 31, 1995. This figure represents the difference between what the plaintiffs' class attorneys were paid pursuant to this court's order and what the defendants calculate the PLRA's limit on payments to be. Such a requirement clearly imposes a significant intrusion into the working relationship of both parties as settled by this court's order. If defendants are entitled to a return of fees already paid, they should be entitled to restitution for all fees paid dating back for years in excess of $112.50 per hour. This result is not intended by the statute.

This statute also does not apply to the fees in question that have not been paid. If it did, it would modify the negotiated agreement between the parties in regard to payment for services. Both parties have been working for almost ten years according to the settled orders of this court both for the payment of fees and also for the monitoring of fees. Application of this law would have a retroactive effect in its disruption of the established expectations of the parties, and

again there is no evidence of statutory intent to affect that arrangement.

The essence of the defendants' contention is that a grant of attorneys' fees is prospective in nature and does not affect the substantive rights of the parties. The awarding of fees to a prevailing party, however, does not present the same issues as the taking away of fees from a prevailing party because of a recently- passed statute. In this case, work has been done and fees have been paid pursuant to the orders of this court for almost a decade. Thus the application of PLRA is not prospective in nature because it takes away fees already earned, which would in turn adversely affect the substantive rights of the plaintiff class. The cases cited by the defendants are therefore inapposite to the issues presented by application of PLRA to this case.

Having determined that the Prison Litigation Reform Act of 1995 is not retroactive in its application and, therefore, does not affect attorney fees generated and presented for the period of July 1, 1995 through December 31, 1995, I must now determine what fees are to be paid.

Multiple briefs have been filed and a hearing was held on May 7, 1996 on the fee petitions. I note that they relate to legal services both of Michael Barnhart and Deborah LaBelle, plaintiffs' class counsel.

Michael Barnhart submitted a statement for fees for the period of July 1, 1995 through December 31, 1995 which sets out a detailed billing as to 349.90 hours. Deborah LaBelle submitted a statement for fees for the same period which sets out a detailed billing as to 124.15 hours.

Defendants initially objected to plaintiffs' class counsel's hours for time spent on defendants' appeal of my Opinion and Order denying modification of the Consent Decree, totaling 252.55 hours. Defendants claim these hours are excessive. These hours were then reduced by plaintiffs' class counsel.

Defendants still object to the payment of 100 hours of work that Deborah LaBelle performed in appellate work on

the case, and to the payment of 45 hours of appellate work performed by Michael Barnhart. Barnhart has now waived payment of 27.6 hours relating to his work on appeal to the Sixth Circuit. What remains for decision is the petition for payment of 100 hours in the amount of $15,000.00 to Deborah LaBelle and $2,610.00 in payment of 17.4 hours to Michael Barnhart for their work on this appeal.[1]

This case, over many years, has been before this court and the Sixth Circuit repeatedly. One major problem is the continued shift in counsel in the office of Michigan's Attorney General. In its representation of defendant Department of Corrections, over time, many lawyers in the Attorney General's Office have represented the defendants: Elaine Fischhoff, Thomas Nelson, Brian Mackenzie, Susan Harris, Barbara Schmidt, Susan Przekop-Shaw, Kim Harris and now Lisa Ward.

Undoubtedly their need to learn anew the complex issues in this case increased not only the amount of time that was required to be applied by plaintiffs' class counsel and by me, but it also has diminished the cooperative spirit which marked the relationships between earlier counsel and counsel now involved.

Central to the work that was done on the appeal, and to which most of the present controversy over fees is related, was a remand by the Sixth Circuit to this court to consider the applicability of the U.S. Supreme Court decision in 1992 of *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748. It was at this court's suggestion that the parties agreed to request a remand, which the Sixth Circuit granted; and thereafter the parties and I engaged in extensive negotiation efforts which, unhappily, did not succeed. I then issued an Opinion and Order and when the case was again submitted to the Sixth Circuit, it required additional briefing analysis.

I find that the petitions for payment of fees to Deborah

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[1] All reconstructed hours billed by plaintiffs' class counsel have been paid except for these hours.

LaBelle of 100 hours, and to Michael Barnhart of 17.4 hours, are reasonable. Defendants' motion for modification of the Consent Decree was submitted before the *Rufo* decision. When defendants appealed my initial Opinion and Order, the case had to be briefed and argued. While the appellate decision was pending, the *Rufo* decision came down and the remand followed so that I could reconsider my ruling. When I did so, and defendants again appealed my second Opinion, further appellate work by plaintiffs' class counsel was required.

Plaintiffs' class counsel's petitions, as modified, are therefore GRANTED; and defendants are ordered to pay $15,000.00 forthwith to Deborah LaBelle and $2,610.00 forthwith to Michael Barnhart.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: May 30, 1996

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Everett Hadix, *et al.*,
Plaintiffs-Appellees,
Nos. 96-1851/1907/1908/1943

v.

Perry M. Johnson, *et al.*,
Defendants-Appellants
(96-1851/1908/1943),

United States of America,
Intervenor (96-1908/1943).

United States of America,
Plaintiff-Appellee,

v.

State of Michigan, et al.,
Defendants-Appellants
(96-1907).

Appeal from the United States District Court
for the Eastern and Western Districts of Michigan
at Detroit, Grand Rapids, and Kalamazoo.

Nos. 80-73581; 84-00063; 92-00110--John Feikens, District Judge, Richard A.Enslen, Chief District Judge.

Argued: February 4, 1997

Decided and Filed: May 20, 1998

Before: MARTIN, Chief Judge; NORRIS and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which MARTIN, C. J., joined. NORRIS, J. (pp. 47-51), delivered a separate opinion concurring in part and dissenting in part.

OPINION

KAREN NELSON MOORE, Circuit Judge. We are called upon in this appeal to perform the delicate task of determining whether Congress unconstitutionally encroached into matters reserved for the Judiciary in enacting the automatic stay provision of the Prison Litigation Reform Act ("PLRA" or "Act"), Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), as amended by the Department of the Judiciary Appropriations Act of 1998, Pub. L. No. 105-119, 123, 111 Stat. 2440, 2470 (1997). 18 U.S.C. § 3626(e) (as amended in 1997). Under the PLRA, the filing of a motion to terminate a prison conditions consent decree triggers an automatic stay of all prospective relief under the decree on the thirtieth day after the filing of the motion, or the ninetieth day after the filing should the court postpone the effective date of the automatic stay by sixty days for good cause. See 18 U.S.C. § 3626(e)(2)-(3) (as amended in 1997). The automatic stay remains effective until the court rules on the termination motion. See 18 U.S.C. § 3626(e)(2).

In these consolidated cases the Michigan Department of Corrections moved to terminate longstanding consent decrees and sought to have prospective relief under the decrees automatically stayed pending resolution of the motions. The district courts invalidated the PLRA automatic stay provision on separation-of-powers and due process grounds. During the pendency of this appeal, Congress enacted Pub. L. No. 105-119, 123, 111 Stat. 2440, 2470 (1997), which amended the PLRA's automatic stay provision. The prisoners and the Department of Justice argue that under the amended statute Congress implicitly recognizes the inherent power of the courts to suspend the automatic stay in accordance with generally applicable equity standards, an interpretation with which the state officials disagree.

We believe the state officials' construction of the PLRA's automatic stay provision violates the separation-of-powers doctrine because under their interpretation, the automatic stay amounts to a direct legislative suspension of a judicial order and, alternatively, intrudes impermissibly into the effective functioning of the Judiciary under certain circumstances. In contrast, the reasonable construction espoused by the prisoners and the Department of Justice does not violate separation-of-powers principles. Accordingly, we hold that the PLRA automatic stay provision, as construed to permit the courts to exercise their inherent equitable powers, does not give rise to an unconstitutional incursion by Congress into the powers reserved for the Judiciary. The parties also raise several other issues that we address below, including whether the attorney fees provisions of the PLRA should apply retroactively to pre-enactment conduct.

* * *

IV. RETROACTIVITY OF ATTORNEY FEES PROVISION

We now turn to the award of attorney fees entered in the Hadix litigation by Judge Feikens on May 30, 1996. See J.A. #96-1851 at 464-69. What would have amounted to a rather commonplace judicial ruling on disputed attorney hours in an ongoing litigation has been complicated by its unfortunate timing. The inmates' entitlement to attorney monitoring fees and procedures for payment was established in the Hadix litigation in 1987. See J.A. #96-1851 at 165-66. Pursuant to prescribed procedure, in early 1996 the inmates submitted to the state officials petitions for attorney fees covering the period of July through December 1995. The state officials objected to certain hours, and the parties could not resolve the dispute by themselves. The inmates therefore filed a motion for attorney fees with the court on March 12, 1996. J.A. #96-1851 at 277-78. The motion, entirely for fees incurred in the latter half of 1995, was pending before the district judge on April 26, 1996, when the PLRA took effect.

Section 803(d) of the PLRA amended the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, *et seq.*, as it applied to awards of attorney fees. Prior to the

passage of the PLRA, courts were authorized under 42 U.S.C. § 1988 to award attorney fees in this type of prison reform litigation based on the community's market rate for the services rendered. See *Hadix v. Johnson*, 65 F.3d 532, 536 (6th Cir. 1995); *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989). Section 803(d) of the PLRA, however, limits attorney fees authorized in prison litigation to an amount "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and proportional to or directly and reasonably incurred in enforcing the court-ordered relief. See 42 U.S.C. § 1997e(d).[18] In addition, the rate upon which the award is based may not exceed 150 percent of the hourly rate

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[18] Section 1997e of Title 42, as amended by the PLRA, provides in relevant part:

> (d) Attorney's Fees
>
> (1) In any action brought by a prisoner . . . in which attorney's fees are authorized under [42 U.S.C. 1988], such fees shall not be awarded, except to the extent that
>
> > (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [42 U.S.C. 1988]; and
> >
> > (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
> >
> > (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

established under 18 U.S.C. § 3006A.[19] The 1995 established rate of pay in the *Hadix* litigation was $150 per hour. See J.A. #96-1851 at 174, 392. Though the parties do not agree on how the PLRA would affect the rate of pay in

this case, we assume, for illustrative purposes only, that the PLRA would cap the maximum hourly rate for attorney fees in this case at $112.50 (150% of $75 maximum hourly rate).[20] See 42 U.S.C. § 1997e(d)(3).

Seeking to take advantage of the lesser rate and more stringent standard, the state officials asked the district court to apply the PLRA's attorney fees provisions to the pending motion, arguing that the PLRA applies to all "awards" entered after the enactment date, April 26, 1996, regardless of when the fees were actually earned. Upon consideration, the district court denied application of the PLRA to the fees earned in 1995 and directed payment at the pre-established rate of $150 per hour. J.A. #96-1851 at 464-69. Before us the state officials renew their arguments and ask us to hold that the PLRA's new attorney fees limitations apply to legal work completed prior to the passage of the PLRA. We decline their invitation.

We recently addressed the retroactivity of the PLRA's attorney fee provisions to legal work performed before its enactment, and held "that allowing the PLRA's limitations on attorney fees to alter the standards and rate for awarding fees

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[19] Section 1997e of Title 42, as amended by the PLRA, provides in relevant part:

> (d) Attorney's Fees . . .
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under [18 U.S.C. 3006A], for payment of court-appointed counsel.

[20] As we hold the PLRA's attorney fees provisions inapplicable to the fee award underlying this appeal, we have no occasion to resolve what would be the hourly rate in this case under the PLRA.

for legal work competed prior to passage of the PLRA results in an impermissible retroactive effect by attaching significant new legal burdens to the completed work, and by impairing rights acquired under preexisting law." *Glover v. Johnson*, ___ F.3d __, 1998 WL 83102, at * 23 (6th Cir. March 2, 1998). Accordingly, we hold that the award of attorney fees for legal work performed prior to the enactment of the PLRA is governed by 42 U.S.C. § 1988, and not § 803(d) of the PLRA.

As for the propriety of any given fee award, provided the district court explains its reasoning in a clear and concise manner, an award of attorney fees under 42 U.S.C. § 1988 "is entitled to substantial deference." *Hadix*, 65 F.3d at 534-35; see also *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). "Accordingly, we review a district court's award of attorney fees, including the fee rate, only for abuse of discretion." *Hadix*, 65 F.3d at 534. The state officials assert that some of the hours to prepare an appellate brief were excessive, duplicative, and thus unreasonable.[21] The contested brief was prepared for an appeal to this court of a district court order refusing to modify the out-of-cell activity plan and mandating college programming following *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). Judge Feikens, who was intimately aware of the work being performed by the attorneys, of the prior history of the case, and of the need to revisit the modification request following Rufo, found the hours at issue to be reasonable for the composition of a complex appellate brief. See J.A. #96-1851 at 464-69 (Op. and Order Regarding Pls.' Mot. for Att'y Fees). Our primary concern is that the fee awarded was reasonable, and we are satisfied that it was. See *Hadix*, 65 F.3d at 535; *cf. Northcross v. Board of Educ. of Memphis City Schs.*, 611 F.2d 624, 640-42 (6th Cir. 1979) (discussing reasonableness of attorney fees award for large school desegregation case),

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[21] On appeal the state officials object to 100 hours for Deborah LaBelle and 17.4 hours for Michael Barnhart. See J.A. #96-1851 at 287-304 for itemization of hours.

cert. denied, 447 U.S. 911 (1980). Not having been persuaded that the district court's reasonableness finding was erroneous,

we affirm the district court's May 30, 1996 order awarding attorney fees.

* * *

VI. CONCLUSION

We conclude that the 1997 amendments to the automatic stay provision, as properly construed to avoid constitutional infirmity, do not interfere with the traditional inherent powers of the courts. Since the lower courts retain the power to suspend the automatic stay in accordance with the traditional standards governing the granting of preliminary injunctions in equity, we REVERSE the lower court orders holding the pre-1997 automatic stay provision unconstitutional. We also AFFIRM the May 30, 1996 award of attorney fees entered in the *Hadix* litigation by Judge Feikens, and we AFFIRM Judge Enslen's decision to retain jurisdiction over the security classification system at the Michigan Reformatory. We REMAND for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, *et al.*,

Plaintiffs, Civil Action No. 77-71229

v.

PERRY JOHNSON, Director, Michigan Department of Corrections, *et al.*

Defendants.
_____/

OPINION GRANTING
AWARD OF ATTORNEY FEES

The attorneys for plaintiffs have petitioned the court for an award of fees in the amount of $108,315.00 and of costs in the amount of $2,227.19 pursuant to 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Awards Act of 1976. This Act states, in part, that:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Background.

Mary Glover is one of a group of named plaintiffs who represented a class of approximately 400 women prisoners in this action. In a case of first impression, the women challenged the policies and procedures practiced by the Michigan Department of Corrections as constituting discriminatory treatment against women who were incarcerated under state law. The case was unable to be resolved before trial,

although lengthy settlement negotiations took place, and ten days were necessary in which to take testimony. In an opinion issued October 17, 1979, I found that the rehabilitation opportunities available to the State's women prisoners were substantially inferior to those available to the State's male prisoners; that implementation of a legal studies course was necessary to guarantee the women inmates' right of access to the courts; and that the use of Kalamazoo County Jail for housing female prisoners was described by state statute and regulation. On October 26, 1979, I entered an order setting forth in general terms the remedies that the State would be required to implement and requiring it to submit for court approval its remedial plan. The plan itself resulted in lengthy negotiations and I entered a final order on April 6, 1981, incorporating the provisions of various interim orders, and providing, in part, for an associate degree program, apprenticeships, prison industries, paralegal training programs, and off-grounds privileges, that would put the women prisoners on parity with the men.

Determination

An award of attorney's fees is proper in this case since plaintiffs prevailed. Congress intended that plaintiffs with meritorious claims which "further an important public interest but do not result in an award of damages from which attorney's fees can be paid, are not discouraged from bringing suit because of the prospect of having to pay their own attorney's fees." *Martin v. Hancock*, 466 F. Supp. 454 (D.Minn. 1979).

Defendants argue that plaintiffs did not prevail on all claims put before me in this complex litigation. They particularly object to any award of attorney fees for a restraining order sought against them for harassing plaintiffs in June of 1980. Plaintiffs brought the petition for a restraining order due to a series of actions taken by the Department of Corrections that could have been construed as harassment or retaliation for the results that plaintiffs achieved through my opinion of October 17, 1979. In effect, Corrections personnel allegedly seized upon an extremely literal meaning of the phrase "equal protection" and used it so as to deny women prisoners privileges that they had theretofore enjoyed, such as

possession of small personal items, including jewelry and personal clothing. Plaintiffs additionally alleged violations of my interim order which required the transfer of inmates to Camp Pontiac (now Camp Gilman) on a voluntary, not selective basis.

Defendants argue that the restraining order constituted a prior restraint on speech in violation of the First Amendment and that since plaintiffs were never granted a preliminary injunction, although a temporary restraining order was issued, they never prevailed on the issue. However, I believe that the issues raised by the petition were, and are, of continuing concern to me, although I found it unnecessary to formally resolve them at that juncture. I do not agree that the failure to issue a formal opinion or order a preliminary or permanent injunction bars the award of attorney fees, for to do so would honor form and ignore the substance of plaintiffs' complaints.

Furthermore, attorney fees are explicitly permitted in these instances. The blueprint for the award is contained in *Northcross v. Board of Education of the Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). The court stated the rule as follows:

> The question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith.

Northcross, supra, 611 F.2d at 636. Since I find that plaintiffs have prevailed in the lawsuit as a whole and since I do not find that any of the issues raised and brought before this court

were frivolous or in bad faith so as to accrue larger attorney fees, I will fully allow claims to be made on all issues in the suit.

Method of Calculation of Attorney Fees

The Civil Rights Attorney's Fees Awards Act serves two purposes. First, the opportunity to obtain competent counsel is provided to those citizens who must sue to enforce their rights, especially where the individual may not normally be able to afford a lawyer. Second, the indirect effect is as a deterrent because fee awards will encourage an individual to vindicate his civil rights in court, providing the added deterrent to the defendant by imposing a monetary burden, even where no damages are awarded. *See, Oldham v. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980). Therefore, it is apparent that fee awards were not meant to be rewards to victorious attorneys but, taking into consideration the practicality of the work of lawyering, a way to encourage attorneys to accept civil rights cases.

The United States Court of Appeals for the Sixth Circuit has interpreted the Act through *Northcross, supra*. The rule in that case is applied by reviewing the petition for attorney fees, subtracting the hours that are duplicative or used for padding, and awarding a "reasonable" attorney fee for the balance of the hours claimed by counsel for the prevailing party.

> Particularly important to this case is the instruction that counsel for the prevailing party should be paid, "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." The goal to be achieved, according to the Senate Report [Senate Report No. 94-1011, reprinted in 1976 U.S. Code Cong. & Admin. News p. 5908], is to make an award of fees which is "adequate to attract competent counsel, but which do not produce windfalls to attorneys."

Northcross, supra, 611 F.2d at 633.

In this case, I am confronted by a situation that is

becoming increasingly common. Plaintiffs were represented by Judith Magid, who was employed by Wayne County Neighborhood Legal Services, and Charlene Snow, an attorney at Michigan Legal Services.[1] In instances where public interest law groups and their attorneys are involved, a simple application of *Northcross* overlooks the particular problems of applying a flat "reasonable" hourly fee that is calculated by reference to community attorneys and their "fair market value." Public interest law groups generally provide a salary for their attorneys which is almost invariably lower than competitive salaries in the communities. The groups are funded by governmental grants and private donations which additionally pay for the support personnel salaries, office rent, supplies, and provide limited litigation funds to pay expert witnesses, filing fees, and other costs of lawsuits (all of which shall hereinafter be referred to as "overhead"). Application of what may be considered a reasonable attorney fee in the community may either be insufficient to compensate the group for its overall costs or, albeit unlikely, constitute a "windfall." Thus, the precepts of *Northcross*, combined with the legislative history of the Civil Rights Attorney's Fees Act, have encouraged my fashioning of a model for the award of attorney fees to public interest law groups. Indeed, *Northcross* may be read so as to encourage such an approach.

> This does not mean that the routine hourly rate charged by attorneys is the maximum which can or should be awarded. In many cases that rate is not "reasonable," because it does not take into account special circumstances, such as unusual time constrain[sic] , or an unusually unpopular cause, which affect the market value of the services rendered. Perhaps the most significant factor in these cases which at times renders the routine hourly fee unreasonably low is the fact that the award is contingent upon success. An attorney's regular hourly billing is based upon an expectation of payment, win,

[1] Ms. Snow has since left Michigan Legal Services but has continued as counsel as a part of her private practice. I have no difficulty in applying the usual test of *Northcross* to those hours that she claims individually.

> lose or draw. If he or she will only be paid in the event of victory, those rates will be adjusted upward to compensate for the risk the attorney is accepting of not being paid at all. Some cases under the civil rights statutes, those in which the facts are strong and the law clear, pose little risk of losing, and the attorney's normal billing rate will be adequate compensation. Others, in developing areas of law or where the facts are strongly disputed, will require a substantial upward adjustment to compensate for the risk.

611 F.2d at 638.

Northcross suggests that a court should "look to the fair market value of the services provided" to calculate a reasonable hourly fee even for those attorneys "who have no private practice." 611 F.2d at 638. However, it has been suggested that legal services attorneys, and by analogy, other public interest lawyers, do not have a normal billing rate since there is no "market" for their s kills. See, *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). In most instances, legal services clients do not pay for the attorney's services. Sometimes a sliding scale arrangement is adopted which bills a client according to his ability to pay, but the fee generally never approaches the cost of providing the services. However, the ever present clientele who use the services could never pretend to be a "market' for the public interest attorney's services.

> The cumulative value to society, and hence the derivative value of individual attorney's time from legal services representation of the needy is substantial, albeit not easily monetized. The only fair conclusion that can be reached is that, with the present structure for the delivery of legal services, relative compensation of private firm attorneys and legal aid lawyers does not entirely reflect differences in the reasonable value of their respective professional time. Courts, in awarding attorneys' fees, are not empowered to rectify this general disparity.

> However, they may properly take account of these market disparities in fixing hourly rates for particular awards.

Rodriguez, supra, 569 F.2d at 1248. Hence, the mere definition of market value precludes a ready determination of reasonable fee for public interest lawyers.

The courts have not agreed to a method of calculation for a reasonable fee to be awarded to public interest law groups although it is well settled that fees are awardable to the groups. *See, Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281, 286 (6th Cir. 1974) , where the court stated that, "[t]he fact that Appellees' counsel was a legal services organization, partially supported by public funds, is irrelevant in determining whether an award is proper," and cases cited therein. *See also, Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974), and *Loney v. Scurr*, 494 F. Supp. 928 (S.D. Iowa 1980), where the court rejected a unique argument by defendant that since plaintiff's attorney fees had already been paid by the state in the form of grants ultimately derived from public money, it is unjust to require the defendant to pay for the same services through an award of attorney fees. Several courts have commented that it is unfair to calculate a reasonable hourly fee on the basis of salary alone. Judge Van Dusen, in *Rodriguez*, commented that:

> Legal services salaries are generally considerably lower than salaries paid associates in private firms who have comparable experience and credentials. This salary differential need bear no relation to quality of representation, in general or in a particular case, or to the benefits received by clients. Compensation disparities usually reflect the relative poverty of legal services funding . . . Reference to absolute salary levels is about as reasonable as deriving the reasonable value of a federal judge's time from his or her salary. . . . To the extent salary levels are relevant, the appropriate referrent

> would be comparable salaries earned by private attorneys with similar experience and expertise in equivalent litigation.

Rodriguez, supra, 569 F.2d at 1248. *See also, Palmigiano v. Garrahy*, 616 F.2d 598, 602 (1st Cir. 1980), *cert. denied*, 449 U.S. 839 (1980); *Lackey v. Bowling*, 476 F. Supp. 1111, 1116-17 (N.D. Ill. 1979); *Gunther v. Iowa State Men's Reformatory*, 466 F. Supp. 367, 368-69 (N.D. Iowa 1979); *Beazer v. New York City Transit Authority*, 558 F.2d 97, 100 (2d Cir. 1977), rev'd on *other grounds*, 440 U.S. 568 (1979). One reason for the decisions appears to be that a market value fee for a private attorney includes several different factors in its calculation, including cost, overhead, and profit, in addition to the fee, that are necessary to provide representation to a client. See, *Gunther, supra*, 466 F. Supp. at 369. A list of considerations exists to assist a court in the determination of what constitutes "appropriate standards" for the determination of a reasonable fee, *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974),[2] but they were formulated with a private practitioner in mind and bear little relationship to public interest lawyers because of the differences between the two groups. Thus, this line of reasoning can be expressed as an "apples and oranges" approach. In lieu of an award of proportionate salary, some courts have concluded that a reasonable attorney fee in the community is an appropriate award to legal services groups. *Palmigiano, supra*, 616 F.2d at 601; *Reynolds v. Coomey*, 567 F.2d 1166 (1st Cir. 1978); *Dietrich v. Miller*, 494 F. Supp. 42, 44 (N.D. Ill. 1980); *Donaldson v. O'Connor*, 454 F. Supp. 311, 313-14 (N.D. Fla. 1978); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974).

It has been suggested in several circuits that there is no

[2] These factors include the following: (1) time and labor required; (2) novelty and difficulty of the question; (3) skill required to perform the service; (4) preclusion of other employment; (5) customary fee; (6) fee agreement; (7) time limitations; (8) amount involved and results obtained; (9) experience, reputation and ability of attorney; (10) "undesirability" of case; (11) nature and length of professional relationship with client; and (12) awards in similar cases. *Johnson, supra*, 488 F.2d at 717-19.

reason to distinguish a reasonable fee for a private attorney from a reasonable fee for a public interest attorney. *Copeland v. Marshall*, 641 F.2d 880, 889 (D.C. Cir. 1980); *Palmigiano, supra*, 616 F.2d at 601-03; *Rodriguez, supra*, 569 F.2d at 1247-48; *Lackey, supra*, 476 F. Supp. at 1116-17; and *Gunther, supra*, 466 F. Supp. at 369. The reasoning in this line of cases begins with Senate Report No. 94-1011, *supra*, which states, in pertinent part:

> The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for the prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." *Davis, supra; Stanford Daily, supra*, at 684.

1976 U.S. Code Cong. & Admin. News at 5913. Thereafter, each court rationalizes its failure to set an independent hourly fee for public interest attorneys differently.

The court in *Copeland V. Marshall*, the most recent decision and, *de facto*, the one with the benefit of previous decisions, articulates four reasons for awarding a community rate to public interest lawyers. First, it relies on the legislative history, stating that no distinction was drawn between the private and public interest bar in the Senate Report and citing to *Davis, supra*, 8 E.P.D. at 5048-49, where awards to public interest law firms were computed in the "traditional manner." Second, it alleges that the purpose of the Civil Rights Attorney's Fees Act will be advanced by the "market value" approach. It speculates that fee awards paid by discriminators may, in fact, aid in reducing the subsidies paid from the public funds to the organization. Third, the court is

concerned that the defendant may profit by a windfall since it would be under less pressure to settle and that the deterrent purpose would be proportionately decreased. Finally, the court relies on precedent set by other judges who considered the question. It cites from the United States Supreme Court's decision in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), which agreed that Congress approved of the award of attorney fees to public interest groups in the Civil Rights Attorney's Fees Awards Act. The court grasps at the citations in the Supreme Court's decision to *Reynolds v. Coomey, supra*, and *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976), to imply a tacit approval of its reasoning, quoting the following passage from *Torres*:

> *allowable fees and expenses may not be reduced because [the prevailing party's] attorney was employed ... by a civil rights organization or because the attorney does not exact a fee.*

(Emphasis added in *Copeland*). 538 F.2d at 13. I do not disagree with the proposition that a prevailing party's attorney fees should not be reduced merely because counsel is employed by a public interest law firm but I contend that it should be calculated differently to account for the differences between public interest attorneys and private lawyers.

The panel in *Palmigiano, supra*, argues in the same vein as *Copeland*, citing the passage from *Davis* but noting that the court in *Davis* made its own assessment of reasonable hourly rates by referring to the *Johnson* criteria. *See*, footnote 2, *supra*. The court also approved an award of "market value" fees because it would enable more civil rights litigation to be funded through an organization with finite resources, thus furthering the legislative purpose and noted that it would not consider such enrichment to constitute a windfall. This reasoning was also applied in *Lackey, supra*.

In *Rodriguez*, supra, the panel recognized the difficulty of applying a normal billing rate to attorneys salaried by publicly funded legal services organizations. It noted that private firms often calculate into their billing rates the financial stake of the firm in the contested matter, a concern not reflected by the public interest law firms who, admittedly, have no "market."

However, the court ultimately decided that to the extent salaries are relevant to consideration in the calculation of a fee, they should be compared to salaries of attorneys in the private sector with similar experience and expertise, a conclusion based on rhetoric not reasoning. On remand, the district court was requested to recalculate the fee award to reflect the value of the attorney's time with guidance that consisted principally of rejection of the previously used methods of the court -- annual salary and compensation for lawyers appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (1970).

The concern that defendants would profit from the calculation of different hourly fees for public interest and private attorneys was echoed by the court in *Gunther*, supra. In rejecting the *Page-Alsager* approach of its neighboring district, one based on a proportionate amount of the attorney's salary (see my discussion *infra*, at 17-18) , the court declared that the award under the method would be a "travesty and substantially harm future plaintiffs represented by public interest counsel in their attempts to induce settlement. 466 F. Supp. at 368-69. However, the case intimates that a more complex method of arriving at an attorney fee for a public interest group is needed, since

> compensating an organization according to its employee's salary does not take into consideration: (1) the criterion established in *Johnson*, *supra*, (2) the employer's overhead costs; and (3) salaries for other support personnel.

466 F. Supp. at 369.

I think that the "apples and oranges" approach is as simplistic as the title suggests. The Legal Services Corporations Act, 42 U.S.C. §2996 *et seq.*, provides that:

> No funds made available by the Corporation under this subchapter, either by grant or contract, may be used --
>
> (1) to provide legal assistance (except in accordance with guidelines promulgated by the Corporation) with respect to any fee-generating

> case (which guidelines shall not preclude the provision of legal assistance in cases in which a client seeks only statutory benefits and appropriate private representation is not available)

42 U.S.C. § 2996f(b) (1). The guidelines promulgated by Legal Services Corporation do not wholly prohibit fee-generating cases, but do so only where other adequate representation is available. 45 C.F.R. § 1609.3 Fees may be accepted if other representation is unavailable and a court or administrative body approves the award. 45 C.F.R. § 1609.5 The goal of the guidelines is to restrain the legal services groups from competition with private attorneys while still providing counsel where no private practitioners would accept the case. *See also, Rodriguez, supra*, 569 F.2d at 1246. However, the purposes of the Legal Services Corporations Act would be circumvented if a flat reasonable fee were awarded under the Civil Rights Attorney's Fees Awards Act since the fees in the community generally have profit incorporated in the fixed amount. That profit is not properly awarded to legal services groups is supported, in part, by an analogy to 45 C.F.R. § 1609.6:

> When a case or matter subject to this par- results in a recovery of damages, other than statutory benefits, *a recipient may accept reimbursement* from the client for *out-of-pocket costs and expenses* incurred in connection with the case or matter.

The remedy to this situation can take one of two directions. First, one can begin with a determination of a reasonable hourly fee in the community, guess the built-in profit margin, and subtract the amount of profit from the hourly fee. The second, and I believe better, alternative is to begin with the time spent by the attorney and calculate the proportionate amount of cost to the public interest law group of providing her services for the litigation. This prospective approach has the benefit of avoiding any guess work about a profit margin with the additional benefit of compensating the organizations fully for their costs, especially since they may exceed the reasonable hourly fee for junior associates in a large law firm.

I am only aware of two cases that have tacitly approved of this approach, both written by Judge Hanson, although neither case fully adopts it. In *Alsager v. District Court of Polk County, Iowa (Juvenile Division)*, 447 F. Supp. 572 (S.D. Iowa 1977), the judge awarded attorney fees to three American Civil Liberties Union ("ACLU") lawyers based on the proportion of time that they spent on the litigation and their salaries. His reasoning was:

> The ACLU has been compensated in full for the money expended on attorneys in this case, and, having money that would not otherwise be reimbursed, it can now bring other such similar actions.

447 F. Supp. at 578, *citing* to *Rodriguez v. Taylor*, 428 F. Supp. 1118 (E.D. Pa. 1976), *vacated in part*, 569 F.2d 1231 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Judge Hanson had an opportunity to expound upon his method in *Page v. Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979) where plaintiffs were represented by a recipient of funds from the Legal Services Corporation.[3] Therein he explained:

> *Alsager* simply stated means no more than that where an organization successfully undertakes the expense of representing a civil rights plaintiff through its salaried attorneys and no part of the fee award will compensate the attorneys involved, but instead will reimburse the organization in question, "the fact that an attorney is salaried [affects] the method in determining the amount of fees to be awarded."

468 F. Supp. at 401, *citing to Alsager, supra*, 447 F. Supp. at 577.

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[3] There is some question as to the precedential value of this decision in the Southern District of Iowa. In *Loney v. Scurr, supra*, 494 F. Supp. at 931 n. 7, Judge Hanson himself noted that the *Page-Alsager* approach was undermined by the *Oldham* case, *supra*, at least where legal services organizations (as opposed to public interest groups) are concerned.

I agree with Judge Hanson's theory although I believe that simply basing an award on the proportionate amount of an attorney's salary, as in *Alsager*, is too restrictive. The organization incurs expenses incidental to each attorney's salary in order to enable them to work. In fact, Hanson notes that:

> Nothing in *Alsager* precludes including reasonably ascertainable overhead expenses attributable to the particular litigation, including the costs of support personnel, in an award to be paid to a public interest organization.

468 F. Supp. at 402. Since it is virtually impossible, or at least time consuming, to apportion to each attorney the precise proportion of support staff and services that were used by the attorney, I have devised the following formula that will derive the desired figure for each year and permit the calculation of a reasonable fee to reimburse public interest law groups:

$$\frac{\text{overhead costs}^4}{\text{total annual billable hours}} \div \text{total attorneys} + \frac{\text{attorney's salary}}{\text{total billable hours}} = \text{hourly fee}^5$$

An alternative way to arrive at the same result per annum would be:

4 For the purposes of this calculus, "overhead" encompasses all costs to the organization except attorney's salaries.

5 For example, using an easy illustration, assume a $2,000,000 overhead for forty attorneys. The litigator spent 400 hours of 1600 hours on the case before the court and received a salary of $20,000. The hourly fee would be calculated:

$$\frac{\$2{,}000{,}000 \div 40}{1600} + \frac{\$20{,}000}{1600} = \$31.25 + \$12.50 \quad \$43.75 \text{ per hour}$$

$$\frac{\text{hours on case}}{\text{total hours}} \times \text{salary} + \frac{\text{hours on case}}{\text{total hours}} \times \frac{\text{overhead}}{\text{total attorneys}} = \text{hourly fee}^6$$

Although the concerns articulated by the courts which adopted the "market value" fee for public interest attorneys are valid, I believe that the calculations I propose do not provide a windfall, while complying with the purpose and intent of the Attorney's Fees Act. Additionally, this approach is consistent with the Legal Services Corporations Act and should cause less question about the propriety of fee awards to those organizations. Finally, I believe that in many instances, particularly where a governmental entity is the offender, the difference, if any, between the "market value" fee and the "compensation" fee would be better spent in remedying the disparate treatment or eliminating the discriminatory action. This is not to denigrate the worth or usefulness of the public interest lawyers nor should this be misinterpreted as awarding "incentive" money to private attorneys and not to public interest law groups. Instead, it merely recognizes the reality that a private law firm will not accept civil rights cases with any regularity unless it can be compensated in some manner for the profits it would otherwise earn. Public interest law groups are non-profit organizations and, to restore them to their original financial position, they need not be awarded the profit margin. For these reasons, I have adopted the method of calculation in the award of attorney fees in this case, rendering the award of the amounts listed in Appendix A [text of Appendix omitted].

In calculating the attorney fees under this method, I have separated Ms. Snow's individual claim for-the time that she has spent as a private practitioner in this action and calculated an award according to the traditional method of

6 Using this method with the example in footnote 5, *supra*, the arithmetic is as follows:

$$\frac{\frac{400}{1600} \times \$20{,}000 + \frac{400}{1600} \times \frac{\$2{,}000{,}000}{40}}{400} = \frac{\$5{,}000 + 17{,}500}{400} = \$43.75$$

Northcross. A reasonable "market value" fee in the Detroit metropolitan area for an individual with the skills and expertise of Ms. Snow is $75 an hour. Since the number of hours are reasonable, a total award of $2,936.25 is made to her for 39.15 hours of work.

The remaining hours of work for each attorney were calculated by the formula adopted in this opinion. Since the goal of this method is to compensate the public interest law groups for the cost of providing attorneys, I have not deleted any hours as duplicative. Although duplicative hours are usually omitted, the "reasonable" market value fee that is used will normally account for a certain amount of duplication of services and consultation with other attorneys. Under this method, unlike the traditional one, no extra money exists after costs out of which to recover for certain necessarily duplicative activities. I also reason that two attorneys were necessary in this case and some hours that appear duplicative upon a cursory inspection are not so in reality. On several occasions Ms. Snow and Ms. Magid were called upon to visit their clients to inform them of the progress in the case. In order to facilitate the distribution of the information, the prison population was divided into groups and Ms. Snow and Ms. Magid each spoke with different groups. Similar distribution of labor was made all through the course of this litigation, a fact which is not immediately apparent to someone who is unfamiliar with the course of the litigation. For the same reasons I have allowed recovery for the hours that Ms. Snow and Ms. Magid did not include in their calculation of attorney fees by the traditional method. I understand that this deduction was done to help decrease the amount of attorney fees, but since I have adopted a new approach, these fees should correctly be awarded under the theory of "compensation."

I have disallowed for twelve (12) hours of work performed by law clerks at Wayne County Neighborhood Legal Services and nine (9) hours at Michigan Legal Services since their salary is included in the calculation of overhead.

I have allowed full amounts to be claimed for the costs incurred by both public interest law groups as a part of this litigation, totaling $1,522.90 for Michigan Legal Services and

$670.64 for Wayne County Neighborhood Legal Services.

The final question is whether interest should be awarded on the attorney fees. The practice is by no means uniform and may depend on whether current or historical rates have applied. In the United States District Court for the District of Columbia, the court chose to apply current hourly rates to fees assessed over an eight-year period. *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 402 (D.D.C. 1978). The rationale was that the "inflationary loss suffered by the attorneys because of the long delay in the recovery of their fees" was compensated by an award of current rates and eased the court's task in the calculation. *See also, McPherson v. School District #186*, 465 F. Supp. 749 (S.D. Ill. 1978) , where the court awarded current hourly rates to compensate for increasing overhead and inflationary factors. *Accord, International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir.), *cert. denied*, 449 U.S. 1063 (19000); *Mader v. Crowell*, 506 F. Supp. 484 (M.D. Tenn. 1981); *Fitzpatrick v. Bitzer*, 455 F. Supp. 1338 (D. Conn. 1978), *on remand from* 427 U.S. 445 (1976); *New York v. Darling-Delaware*, 440 F. Supp. 1132 (S.D.N.Y. 1977).

Other courts have calculated attorney fees on the basis of historical rates but, in recognition of inflationary factors and the delay in receipt of funds, have awarded an additional sum to compensate for these factors. For example, in *Vecchione v. Wohlgemuth*, 481 F. Supp. 776 (E.D. Pa. 1979), an additional ten per cent of the calculated fee award was included in the total award "under the rubric of contingency to account for the delay in receipt of payment." 481 F. Supp. at 790. See also, *Keith v. Volpe*, 501 F. Supp. 403 (C.D.. Cal. 1980); *Clark v. Amerada Hess Corp.*, 500 F. Supp. 1067 (S.D.N.Y. 1980) ; *Aamco Automatic Transmissions, Inc. v. Taylor*, 82 F.R.D. 405 (E.D. Pa. 1979). There appears to be no standard method to calculate these awards since some decisions conclude that a percentage of the fee is appropriate, such as *Vecchione, supra*, while others appear to arbitrarily award a set sum, as in *Aamco, supra*. But *see, Allen v. Terminal Transport Co.*, 486 F. Supp. 1195 (N.D. Ga. 1980) , *aff'd without opinion*, 638 F.2d 1232 (1981), *aff'd remanded sub nom. United States v. Terminal Transport Co.*, 653 F.2d 1016 (5th Cir. 1981); *Imprisoned Citizens Union v. Shapp*, 473 F. Supp. 1017

(E.D. Pa. 1979) and *Keisel v. Kremens*, 80 F.R.D.§ 419 (E.D. Pa. 1978), where no additional awards were requested and the courts failed to make such an award *sua sponte*.

I have preferred a more accurate approach than either of these throughout this opinion and I believe that under my method of calculation, interest should normally be awarded to compensate for the delay in payment and inflation. The United States Court of Appeals for the Fifth Circuit reached a similar conclusion in *Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980), *rehearing granted*, 636 F.2d 942 (5th Cir. 1981). By construing the Civil Rights Attorney's Fees Act broadly, the court concluded that although Congress did not explicitly state that interest on attorney fees should be awarded, recovery of interest was consistent with the purpose of the Act. It reasoned, as I do:

> In analyzing the nature of the interest card, it must be understood that the awarding of interest is in no sense a windfall. Because a dollar today is worth more than a dollar in the future, "the only way [a party] can be made whole is to award him interest from the time he should have received the money. *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 196a). Indeed, this case dramatizes the need for interest on attorneys' fees if the attorneys for the prevailing party are to be adequately compensated. Most of the fees at issue in this case were awarded in 1973. Because of inflation, these awards are worth far less today than they were seven years ago. Had the awards been made in 1973, the attorneys could have been drawing interest on that amount for the last seven years.

(Footnote omitted). 616 F.2d at 1276.

In addition to these reasons, the court in *Johnson v. Summer*, 488 F. Supp. 83 (N.D. Miss. 1980) , awarded interest on the attorney fees because to do otherwise would be to frustrate the deterrent effect that the award was meant to have.

> The history of this litigation demonstrates that, despite the provision for fee-shifting created in § 1988, the ability of a private individual to enforce the civil rights statute is impaired by the opposing resources of the State. If an attorney knew that an order of this court providing for reasonable fees were to remain unenforced for well over a year, while the defendant continues to oppose the claim through the appellate process and by other means, that attorney might be deterred from handling any form of *pro bono* litigation. This court believes that such a result is clearly contrary to the purposes of the 1976 amendment to § 1988.
>
> . . . This court believes that an award of interest on attorney's fees under § 1988 is consistent with this rationale, for it will help to counter the deterrence of otherwise competent and eager counsel from participating in protracted litigation, and it will also "fairly place the economical burden" faced by a prevailing party and his counsel where the fee award remains unpaid for an excessive length of time.

400 F. Supp. at 87.

I agree with the concerns of both courts. Additionally, the length of time involved to try complex cases often precludes a determination of attorney fees until long after the initial expenditures were made and interest should be awarded for the delay in payment. Indeed, in this case, over five years have elapsed since suit was begun and there has been an eighteen-month interval between the opinion and the entry of a final order implementing the remedial actions to be taken by defendants.

In this instance, however, I choose to exercise my discretion and deny interest on the fee award. I am aware that the award will be made from the coffers of the State Treasury, not an individual or private entity. As such, I cannot be blind to the quandary in which the State of Michigan

now founders. By doing so, I do not mean to condone the discriminatory actions of the State that I found to be present in this lawsuit nor should my denial of interest be misinterpreted as a tacit disapproval of awards to public interest law groups. However, I find that the State will be deterred by the award of attorney fees and the organizations will be compensated to a large extent for their costs in bringing the suit. Almost $17,600 would be accrued at a six per cent interest rate calculated simply from the end of each calendar year an~: although such a sum is sizable to the groups involved, it is also very sizable to a state that is struggling against an eroding tax base and a depressed economy that strongly affects the northeastern industrial states.

Conclusion

Having determined that costs and attorney fees are appropriate in this instance, the following is a summary of the award.

Wayne County Neighborhood Legal Services	
Attorney Fees for Judith Magid	$41,927.98
Costs	670.64
Total	$42,598.62
Michigan Legal Services	
Attorney Fees for Charlene Snow	$45,881.55
Costs	1,522.90
Total	$47,404.45
Charlene Snow	$ 2,936.25
Total Award	$92,939.32

An appropriate order may issue.

John Feikens
Chief United States
District Judge

February 2, 1982

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al,

Plaintiffs,

-vs- USDC No. 77-71229

PERRY JOHNSON, Director, Michigan Department of Corrections, et al, HON. John Feikens

Defendants.
_____/

STIPULATION AND ORDER
REGARDING ATTORNEY'S FEES

IT IS HEREBY STIPULATED by and between the parties, by their attorneys, in that the following Order may be entered.

Judith Magid (24525)
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(313) 962-1177

Brian MacKenzie
Assistant Attorney General
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(517) 373-3474

Charlene Snow (26923)
975 East Jefferson Ave.
Detroit, MI 48207
(313) 259-8383

Attorney for Defendants

Attorneys for Plaintiff

ORDER

Plaintiff herein, filed a Motion for Attorney's Fees and Costs and the parties having Stipulated to the entry of this

Order:

IT IS HEREBY ORDERED that JUDITH MAGID be and is awarded $23,782.00 and CHARLENE SNOW be and is hereby awarded $17,224.00 for fees and costs, which shall be paid by Defendants within fifteen (15) days of the date of this Order.

JOHN FEIKENS
United States District Court

Dated: May 9, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al,

Plaintiffs,

-vs- USDC No. 77-71229

PERRY JOHNSON, Director, Michigan Department of Corrections, et al, HON. John Feikens

Defendants.
_____/

CHARLENE SNOW (P26923)
DEBORAH LaBELLE (P31595)
Attorneys for Plaintiffs

BRIAN MacKENZIE (P24097)
Attorney for Defendants

ORDER GRANTING PLAINTIFFS' MOTION FOR SYSTEM FOR SUBMISSION OF ATTORNEY FEE

At a session of said Court, held in the Federal Building, Detroit, Michigan, on November 12, 1985
PRESENT: HON. JOHN FEIKENS
U.S. DISTRICT COURT JUDGE

Plaintiffs having filed their Motion for System for Submission of Attorney Fees; the Court and opposing counsel having had the opportunity to review said Motion; and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months. Defendants will have twenty-eight days in which to contest the amount of

the fee request.

John Feikens
U. S. District Court Judge

Approved as to form:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al.,

Plaintiffs

v. Civil Action No. 77-71229
Honorable John Feikens

PERRY JOHNSON, Director,
Michigan Department of
Corrections, et al.,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

On November 12, 1985 I entered an order requiring plaintiffs' counsel to submit requests for attorney fees every six months and requiring defendants to submit any objections within twenty-eight (28) days of the request. Plaintiffs' counsel submitted their most recent request on February 19, 1987. Charlene Snow requests an hourly rate of $125 for 261.30 hours ($32,662.50) and $942.38 in costs for a total of $33,604.88.[1] Deborah LaBelle requests an hourly rate of $125 for 234.25 hours ($29,281.25) and $1,535.04 in costs for a total of $30,816.29.[2] Defendants object to any hourly rate greater than $100, to an unspecified number of hours claimed for work on behalf of inmates of the Florence Crane Correctional Facility, and to an unspecified number of allegedly duplicative hours. The parties have been unable to compromise their differences.

I find that an hourly rate of $115 reasonably compensates plaintiffs' counsel for the market value of their services. *Coulter v. Tennessee*, 805 F.2d 146, 149 (6th Cir. 1986) ("[H]ourly rates for fee awards should not exceed the

1 This request excludes 5.85 hours spent on an appeal pending before the United States Court of Appeals for the Sixth Circuit.

2 This request excludes 4.60 hours spent on an appeal pending before the United States Court of Appeals for the Sixth Circuit.

market rates necessary to encourage competent lawyers to under-take the representation in question."), *cert. denied*, 55 U.S.L.W. 3820 (U.S. June 8, 1987), *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 638 (6th Cir. 1979) ("[T]he court should look to the fair market value of the services provided."), *cert. denied*, 447 U.S. 911 (1980) The median hourly rate in 1986 for Detroit attorneys specializing in civil rights litigation is $115.[3] Moreover, $115 is the hourly rate plaintiffs' counsel accepted for their immediately preceeding fee request.

I find that the hours claimed for work on behalf on inmates of the Crane Facility are compensable even though defendants contest the applicability of this Court's judgment at the facility. Plaintiffs' counsel are charged with responsibility for monitoring compliance with this Court's judgment requiring parity of programming between male and female inmates in the custody of the Michigan Department of Corrections. Counsel reasonably monitored compliance throughout the State. *Adams v. Mathis*, 752 F.2d 553, 554 (11th Cir. 1985) ("measures necessary to enforce the remedy ordered by the trial court" are compensable provided they are "reasonably responsive to the prior court order").

The hours claimed by plaintiffs' counsel reflect duplication inevitably present with more than one attorney working on the case. To account for the duplication, I reduce the hours claimed by each attorney ten percent (10%).[4] *See Northcross, supra*, 611 F.2d at 636-637 ("[W]e have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services. Such an approach seems preferable to an attempt to pick out, here and there, the hours which were duplicative."); *Weisenberger v. Huecker*, 593 F.2d 49, 54 n.12 (6th Cir. 1979) (reducing total hours by ten percent (10%) to account for duplication), *cert. denied*, 444 U.S. 880 (1979). *Cf. Louisville Black Police Officers Org. v. Louisville*, 700 F.2d 268, 276 (6th Cir. 1983) ("[Fee applicants do not challenge the district court's across-the-board reduction of 5% of all hours

3 Stiffman, "The 1986 ICLE Survey on Legal Services Fees," at 8.

4 Accordingly, I deduct 26.13 hours from Charlene Snow's 261.30 hours claimed, leaving 235.17 compensable hours. I deduct 23.43 hours from Deborah LaBelle's 234.25 hours claimed, leaving 210.82 compensable hours.

claimed, conceding that such a reduction for duplication was within the district court's discretion.").

Accordingly, IT IS ORDERED that Charlene Snow recover from defendants an hourly rate of $115 for 235.17 hours ($27,044.55) and $942.38 in costs for a total of $27,986.93. IT IS FURTHER ORDERED that Deborah LaBelle recover from defendants an hourly rate of $115 for 210.82 hours ($24,244.30) and $1,535.04 in costs for a total of $25,779.34.

John Feikens
United States District Judge

DATED: July 30, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al.,

Plaintiffs,

v. Civil Action No. 77-71229

PERRY JOHNSON, et al., Hon. John Feikens

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

In this case, a plaintiff class composed of female prison inmates sought access to equal educational and vocational opportunities within the Michigan prison system. I have already held that plaintiffs' constitutional rights to equal protection of the laws were violated, because male inmates received greater educational and vocational opportunities than female inmates. This case is now on appeal to the United States Court of Appeals for the Sixth Circuit. That court has agreed to hear the appeal on an expedited basis, and has issued a stay for the pendency of that appeal.

Plaintiffs' attorneys, Charlene Snow and Deborah LaBelle, now seek attorney fees and costs. On November 12, 1985, I entered an order awarding attorney fees to plaintiffs' counsel, and granted plaintiffs' motion to establish a system for payment of these fees. Plaintiffs' attorneys are also to be compensated for monitoring defendants' compliance with my orders in this case. My November, 1985 order requires LaBelle and Snow to submit requests for fees to defendants every six months. Defendants must object to these requests within twenty-eight days of receiving a request.

LaBelle and Snow filed a fee request on August 23, 1989, seeking fees and costs accumulated from February 1, 1987 through December 31, 1987. LaBelle requests $37,755.93 in fees. This amount reflects payment for 262.65 hours of work,

at a rate of $125 per hour, with a 15% enhancement. She also asks for reimbursement for costs of $1,079.39. Snow seeks $36,627.50 in fees. She seeks payment for 254.8 hours, at $125 per hour, with a 15% enhancement. Snow says she incurred costs of $372.90. Both LaBelle and Snow say an enhancement is justified because they have had to wait two years for payment. I held a hearing on these requests, and defendants' objections thereto, on October 2, 1989.

On September 22, 1989, LaBelle and Snow filed a motion for settlement of fees and costs, in which they seek fees and costs for January 1, 1989 through June 30, 1989. I held a hearing on this motion on October 20, 1989. Because the issues in the motions for 1987 and 1989 fees are similar, I will address both motions in this opinion and order.

For the first six months of 1989, LaBelle requests attorney fees of $52,512.50, representing 350.75 hours of attorney time at $150 per hour. She also asks for costs of $8,662.60. For this same period, Snow requests $56,527.50 in attorney fees for 376.85 hours at $150 per hour. She seeks $3,391.56 for costs.

Defendants make similar objections to both the 1987 and 1989 fee requests. First, they argue that, notwithstanding my 1985 order granting fees, plaintiffs are not entitled to any fees unless they are found to be prevailing parties, as required in 42 U.S.C. § 1988. Defendants ask me to hold a fee award in abeyance until the court of appeals reaches the merits of this case, and so decides which party prevailed. Second, defendants contend that both the $125 hourly rate requested for 1987 and the $150 hourly rate requested for 1989 are excessive. Third, they say I should reduce LaBelle's and Snow's hours due to duplication of efforts, unreasonable expenditures of time, and time spent on matters unrelated to this case.

As to the 1987 request only, defendants argue a fee enhancement is inappropriate. Finally, with regard to the 1987 fees, they argue that hours spent on plaintiffs' motion for contempt and on defendants' appeal from my order appointing an administrator are not monitoring hours, but attorney hours. Therefore, plaintiffs should only receive fees

for this time, if they are the prevailing parties.

I. THE PREVAILING PARTY ISSUE

My November 12, 1985 order in this case resolves the prevailing party issue by granting plaintiffs attorney fees. This order states in part:

> It is hereby ordered that plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months.

I will not now revisit the decision to award plaintiffs post-judgment attorney fees. The parties stipulated to the entry of this order four years ago, and since then have abided by their agreement. While 42 U.S.C. § 1988 does provide that prevailing parties in civil rights suits may receive attorney fees, defendants should have voiced this objection in 1985. Neither this statute nor my order requires me to redecide the prevailing party issue every six months throughout this prolonged litigation. Rather, the order states plaintiffs are entitled to attorney fees.

My 1985 order has never been appealed. Therefore, plaintiffs are entitled to fees. The only issue now is the amount of fees to be awarded.

Defendants have not objected to plaintiffs requests for costs in either 1987 or 1989. Since I find these costs reasonable, I hereby GRANT plaintiffs the costs they requested for 1987 and 1989.

Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979) *cert. denied* 447 U.S. 911 (1980), established a framework for use in determining reasonable attorney fees in civil rights cases. *Louisville Black Police Officers Organization, Inc. v. Louisville*, 700 F.2d 268, 274 (6th Cir. 1983). Under *Northcross*, I must determine the number of hours to be compensated, and multiply this figure by a reasonable hourly rate. See *also Hensley v. Eckerhart*, 461 U.S 424, 433 (1982). This rate should be based on the market rates in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895

(1983).

II. DEFENDANTS' OBJECTIONS TO NUMBER OF HOURS BILLED

LaBelle and Snow have submitted affidavits documenting the time they spent on particular tasks related to this case. Defendants argue that I should reduce these hours by at least 10% because LaBelle and Snow needlessly duplicated their efforts and spent excessive time. Defendants object to hours spent reviewing co-counsel's work, conferring with co-counsel, and appearances by both LaBelle and Snow at meetings and hearings.

In their objections to the 1989 fee request, defendants also contend that plaintiffs' counsel seek compensation for time spent on tasks unrelated to this case. Defendants say time spent on legislative efforts to get greater appropriations for female inmates' education is unrelated. They also argue time spent reviewing an inmate's denial of community placement and preparing fee summaries is not related to this case.

Because I find that plaintiffs' counsel have not spent excessive time, unnecessarily duplicated their efforts or worked on matters unrelated to this case, I will not reduce the number of hours billed. *Hensley, id.*, requires that attorney hours be reasonably spent. I have discretion to grant attorney fees for time spent conferring with co-counsel. *Berberena v. Coler*, 753 F.2d 629, 633 (7th Cir. 1985); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1337 (D.C. Cir. 1982).

I find that LaBelle and Snow spent a reasonable amount of time conferring and reviewing each other's work, so I will exercise my discretion and grant fees for this time. LaBelle's and Snow 5 affidavits show that they generally worked on separate tasks; each made a separate contribution. The hours they spent conferring are reasonably proportionate to their total hours. Given the magnitude and complexity of this case, such consultation is at least reasonable, and probably necessary.

Defendants argue that LaBelle and Snow unnecessarily attended hearings and meetings together. Defendants concede that I may refer to the number of lawyers they used in similar situations as an indication of the effort required. *Brief in Support of Defendants' Objections to Fee Petitions*, filed September 6, 1989, at 8-9 *citing Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983). As plaintiffs point out, defendants often had two attorneys attend the evidentiary hearings I held in April of this year. Further, if both plaintiffs' attorneys had not attended, LaBelle and Snow would have had to spend time conferring about the hearings instead. I find no unnecessary duplication in having both plaintiffs' attorneys attend these complex hearings, nor in appearing at any of the other matters defendants refer to.

As to the 1989 fee request, defendants claim plaintiffs' counsel billed time spent on matters unrelated to this case. First, defendants argue the 3.1 hours plaintiffs' lawyers spent preparing fee summaries for this motion are incompensable overhead. I disagree. Plaintiffs may recover attorney fees for time spent litigating the fee issue itself. *Northcross, id.*, 611 F.2d at 637.

Second, defendants object to paying for 19.8 hours spend on attempts to procure greater state appropriations for the education of female inmates. Such appropriations go to the heart of the dispute in this case. Defendants have argued in the past that insufficient appropriations prevent them from complying with my orders. Plaintiffs' lawyers would be remiss if they had not attempted to remove this barrier to compliance. I find that these 19.8 hours are closely related to the issue in this case, are reasonable, and are accordingly compensable.

Third, defendants argue that 8.65 hours spent on telephone calls concerning inmate Susan Fair's denial of community placement is unrelated to this case. Plaintiffs say they only billed for two hours on this issue. Given the magnitude of the 727.6 total hours claimed in the 1989 petition, this 6.65 hour difference is de *minimis*. I find that the time plaintiffs' counsel spent investigating this issue is related to this case and compensable.

Plaintiffs' counsel claim that Fair, a named plaintiff, has been involved in this case. Defendants do not dispute this point. LaBelle and Snow say that when Fair was denied placement in the community, they investigated the possibility that this denial was in retaliation for Fair's involvement in *Glover*. While plaintiffs' counsel decided not to bring this matter before me, Federal Rule of Civil Procedure 11 requires them to do such investigation before bringing the issue here. Since the possibility of such retaliation has been addressed in this case previously, good representation required that LaBelle and Snow at least check into Fair's allegation. Accordingly, I will not reduce plaintiffs' time on this basis.

Finally, defendants object to charges for 13.9 hours spent on Trust work. This matter is clearly related to the present case. This Trust, known as the Judith Magid Trust Fund, was established by my September 8, 1980 Interim Order. Defendants were to make quarterly payments into the Trust, to compensate for certain back wages that plaintiff inmates should have received. In my September 14, 1989 Memorandum Opinion and Order, I found that defendants were delinquent in making these payments. *Id.* at 43-48. I now find that plaintiffs' 13.9 hours are compensable, because the Trust is central to the relief ordered in this case, and was an issue in the recent contempt proceedings.

In summary, I find no unnecessary duplication of effort, or excessive time spent on this case by plaintiffs' counsel. I also find that the issues defendants object to are related to this case and therefore compensable. Accordingly, I GRANT LaBelle and Snow compensation for the hours they requested, without reduction.

III. DEFENDANTS' OBJECTIONS TO REQUESTED HOURLY RATES

Plaintiffs request an hourly rate of $125, with a 15% enhancement for their 1987 fees. They seek $150 per hour for their 1989 fees. In addition to their own affidavits, LaBelle and Snow have submitted the affidavits of other local lawyers who practice in the civil rights litigation field. These lawyers say that a rate of $150 is a reasonable hourly rate for the type of work LaBelle and Snow performed in *Glover*.

Defendants object to both the $125 and $150 hourly rates, as well as to the 1987 enhancement. They suggest that I use $92 per hour as a benchmark. This is the median hourly billing rate reported in the November, 1988 issue of the Michigan Bar Journal.

Even using $92 per hour as a starting point, I find as a matter of fact that $135 per hour is a reasonable current rate for plaintiffs' counsel. Rather than add a 15% enhancement to the historic rate of $125 requested for 1987, I GRANT the current rate of $135 per hour, to compensate for the two-year delay in payment. See *Knop v. Johnson*, 712 F. Supp. 571, 584 (W.D. Mich. 1989) *citing Louisville Black Police Officers, id.*, 700 F.2d at 275-276; and *Cantor v. Detroit Edison*, 86 F.R.D. 752, 767 (E.D. Mich. 1985) (applying a current, rather than historic, hourly rate to compensate for delay in payment). In sum, I award plaintiffs' attorneys compensation of $135 per hour for both their 1987 and 1989 fee requests.

The goal of such attorney fee awards is to "make and award fees which are 'adequate to attract competent counsel, but which does not produce windfalls to attorneys.'" *Louisville Black Police Officers, id.*, 700 F.2d at 278 *citing Northcross, id.* I retain discretion to achieve this goal. *Louisville Black Police Officers, id.* I find that an hourly rate of $135 meets this goal. As in *Knop, id.* at 583, and *NAACP v. Detroit Police Officers Association*, 620 F. Supp. 1173, 1183 (E.D. Mich. 1985) *reversed on other grounds*, 819 F.2d 1142 (6th Cir. 1987), I find it unreasonable to confine plaintiffs' counsel to a median market rate.

LaBelle and Snow submitted affidavits detailing their qualifications and experience. LaBelle was admitted to the Michigan Bar in 1979. She filed her appearance in this case in 1985. She has considerable experience in prisoners' rights and civil rights litigation. She normally bills at an hourly rate of $150 for similarly complex litigation. Snow was admitted to the State Bar in 1976, and entered her appearance in this case before LaBelle. She has published several articles in this area, and has extensive experience with similar cases.

In July, 1987, I awarded LaBelle and Snow attorney fees

in this case at $115 per hour. *Memorandum and Opinion Order* filed July 30, 1987. I based this award in part on the fact that they had accepted this rate for their immediately preceding fee request. *Id.*

An attorney's special skill and experience should be reflected in her hourly rates. *Blum v. Stenson, id.*, 465 U.S. at 898. See *also Knop* at 582. I find that LaBelle's and Snow's skill and experience with this and similar cases merit an hourly rate of $135, rather than the $92 median rate. The recent evidentiary hearings in this case required counsel to be well acquainted with this case's history. Any other lawyers would have needed more hours to do this same work, and their higher hourly rate reflects this factor.

Additionally, my award of $115 approximately two and one-half years ago supports this conclusion. I find it reasonable that counsel's hourly fee should increase by twenty dollars in this time.

Finally, in *Knop v. Johnson, id.*, Judge Richard Enslen of the United States District Court for the Western District of Michigan recently awarded lawyers with similar roles and qualifications $125 to $150 per hour for out-of-court time and $150 to $190 per hour for in-court time. *Knop* and *Glover* are both large-scale prisoners' rights cases of similar complexity in Michigan. Judge Enslen specifically found that plaintiffs' counsel merited an hourly rate well above the median rate, due to their experience, scope of practice, quality of representation, and complexity of issues involved. *Id.* at 584. Judge Enslen held that these hourly rates are reasonable for attorneys practicing in Michigan. *Id.* Because of the similarity between *Glover* and *Knop*, I find that the goal of uniformity discussed in *Northcross, id.*, 611 F.2d at 636, is served by my reference to the hourly rates used in *Knop*.

Given the range of prevailing market rates established in *Knop*, I find that $135 per hour is a reasonable rate for the combined in-court and out-of-court time expended by LaBelle and Snow. Particularly in their 1989 fee application, many hours were spent in court for evidentiary hearings. This hourly rate adequately reflects the market value for both types of activities.

In conclusion, I GRANT plaintiffs' counsel their combined requested costs of $1,452.29 for 1987, and combined requested costs of $12,054.16 for January through June of 1989. I also GRANT LaBelle attorney fees of $82,809, for 262.65 hours in 1987 and 350.75 hours in 1989, at $135 per hour. I GRANT Snow attorney fees of $85,272.75, for 254.8 hours in 1987 and 376.85 hours in 1989, at $135 per hour.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Nov. 27, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

MARY GLOVER, et al.,

Plaintiffs,

v. No. 77-CV-71229-DT
Hon. John Feikens

PERRY JOHNSON, et al.,

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

In this case, I held that a plaintiff class of female inmates, seeking access to equal educational and vocational opportunities in the Michigan prison system, demonstrated a constitutional denial of equal protection because male inmates received greater educational and vocational opportunities than female inmates. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979), *aff'd*, *Cornish v. Johnson*, 774 F.2d 1161 (6th Cir. 1985), *cert. denied*, *Johnson v Manzie*, 478 U.S. 1020 (1986).[1] Later rulings in this case are now on appeal to the United States Court of Appeals for the Sixth Circuit. *Glover v. Johnson*, No. 77-71229 (E.D. Mich. Sept. 14, 1989)(order directing the Michigan Department of Corrections to appoint an administrator) *appeal docketed* No. 89-2191 (6th Cir. 1989); *Glover v. Johnson*, No. 77-71229 (E.D. Mich. Nov. 27, 1989) (order granting attorney fees), *appeal docketed* No 89-2421 (6th Cir. 1989).

I. Procedural History Regarding Attorney Fees and Costs

The issue before me presently is attorney fees and costs. On November 12, 1985, I entered an order awarding attorney fees to plaintiffs' counsel and granted plaintiffs' motion to

[1] *See also*, *Glover v. Johnson*, 510 F. Supp. 1019 (E.D. Mich. 1981).

establish a system for payment of these fees.[2] The November 1985 order requires plaintiffs' attorneys to submit requests for fees to defendants every six months. Defendants must object to each request within twenty-eight (28) days of receipt.

On November 27, 1989, I issued an order and opinion further addressing attorney fees and costs. In that opinion, I discussed fees and costs covering the periods February 1, 1987 through December 31, 1987 and January 1, 1989 through June 30, 1989. I granted plaintiffs' request for attorney fees and costs with slight modifications. I ruled that plaintiffs' counsel are entitled to attorney fees under the 1985 order; that they have not spent excessive time on this case; that they have not unnecessarily duplicated their efforts; and that they have not requested fees from defendants for matters unrelated to this case.

Before me presently is plaintiffs' motion for settlement of attorney fees and costs. On or about January 16, 1990, Deborah LaBelle and Charlene Snow, attorneys for plaintiffs, submitted a list to defendants that delineated attorney fees and costs for the period July 1, 1989 through January 8, 1990. LaBelle seeks fees of $20,700.00. This amount reflects 138.0 hours of work billed at a rate of $150.00 per hour. She also requests reimbursement of $1335.02 in costs. Snow seeks fees of $40,882.50 and costs of $3877.67. Her fees reflect 272.55 hours of attorney time billed at a rate of $150.00 per hour, and 5.50 hours of legal assistant time billed at a rate of $40.00 per hour.

Pursuant to my 1985 order, on February 13, 1990, defendants filed objections to the payment of attorney fees and costs. Defendants raise a host of objections to plaintiffs' list of fees and costs. Many of their objections were previously addressed in my November 27, 1989 opinion and order. Defendants claim that LaBelle and Snow excessively duplicated their efforts; that they listed hours for work performed on matters unrelated to this case; that work related to issues on appeal should be deferred until a final decision is

[2] Under my order, plaintiffs' attorneys are compensated for monitoring defendants' compliance with my orders in this case, as well as for their legal work. *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624, 637 (6th Cir. 1979)("Services devoted to reasonable monitoring of the court's decrees. . .are compensable services.").

made by the United States Court of Appeals for the Sixth Circuit to determine if plaintiffs are prevailing parties on those issues; that plaintiffs' attorneys claim an excessive hourly rate; that plaintiffs do not distinguish between monitoring, non-trial legal, and trial activities; and that legal assistant fees should be included in the attorney hourly rate as overhead. I held a hearing on these motions on March 19, 1990.

II. Issues on Appeal

A number of issues from my November 27, 1989 order are on appeal to the United States Court of Appeals for the Sixth Circuit. These issues include whether plaintiffs are prevailing parties; whether plaintiffs' attorneys' lobbying efforts are compensable; and whether LaBelle and Snow excessively duplicated each other's efforts. I repeat my rulings on these issues here, and incorporate these by reference.[3] Although similar issues are raised in the instant motions, they remain separate and I must address them substantively, regardless of the appeal of the November 27, 1989 order.

III. Objections Raised by Defendants

The United States Court of Appeals for the Sixth Circuit has established a framework for determining reasonable attorney fees in civil rights cases. *Northcross v Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979) *cert. denied* 447 U.S. 911 (1980); *Louisville Black Police Officers Organization Inc. v Louisville*, 700 F.2d 268, 273-74 (6th Cir. 1983). I must determine the number of hours to be compensated and multiply this figure by a reasonable hourly

[3] In that opinion, I ruled that plaintiffs are entitled to attorney fees under my November 12, 1985 order; that plaintiffs' attorneys did not spend excessive time on this case, did not unnecessarily duplicate their efforts, or seek compensation for time spent on tasks unrelated to this case; and that $135.00 per hour is an appropriate rate of compensation for plaintiffs' attorneys.

rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1982).[4] This rate should be based on the market rates in the relevant community for similar work. *Blum v. Stenson*, 465 U.S. 886, 895 (1983).

Defendants and plaintiffs agree on one issue. They agreed at the March 19, 1990 bearing that defendants should pay LaBelle $1702.00 and Snow $1966.50 in monitoring fees, representing 31.90 hours of work paid at the monitoring rate of $115 per hour as stipulated by the parties and as provided under my 1985 order. I GRANT plaintiffs' motion regarding monitoring fees.

Defendants raise a number of objections, however, to the remainder of the attorney fees and costs. First, defendants charge that plaintiffs' attorneys excessively duplicated each other's efforts. They state that time in excess of 15 hours was spent reviewing co-counsel's work, conferring with co-counsel, and other duplicative matters. I addressed this issue in the November 27, 1989 opinion and order and ruled that given the complexity of this case, consultation between the attorneys is not unreasonable. The time plaintiffs' attorneys spent conferring and reviewing each other's work was minimal over a six-month period and probably necessary. *Barberena v. Coler*, 753 F.2d 629, 633 (7th Cir. 1985); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1337 (D.C. Cir. 1982).

Second, defendants object that plaintiffs are claiming fees and costs for matters unrelated to this case. I find defendants' claims without merit. Defendants contend that hours spent on matters relating to two class plaintiffs are irrelevant to this case. At issue are telephone calls with inmate Susan Fair and legal work done on behalf of inmate Anita Alcorta.

Defendants assert that telephone calls related to the denial of Fair's community placement are not compensable.

[4] The resulting figure is referred to as the lodestar. *Knop v. Johnson*, 712 F. Supp. 571, 574 n.1 (W.D. Mich. 1989).

Plaintiffs counter in an affidavit filed March 21, 1990 by LaBelle that telephone conversations with Fair pertained to Fair's workpass and the status and inadequacy of the Camp law library.[5] LaBelle states in her affidavit that she filed a complaint on behalf of Fair in the Circuit Court for the County of Ingham relating to community placement, but that time spent on that matter was not listed in the six-month statement of attorney fees. According to Congress, the courts' purpose should be "to use the broadest and most effective remedies available to them to achieve the goals of the civil rights laws." *Northcross*, 611 F.2d at 633. Because telephone calls with Fair pertain to issues of educational and legal opportunities for women in Michigan prisons, I find them directly relevant to this case and therefore the associated fees are compensable.

Similarly, defendants object to Snow's time expended on access-to-court issues for Anita Alcorta. Defendants claim that Alcorta refused to return other prisoners' legal documents and that work spent on this issue is irrelevant to *Glover*. Plaintiffs contend that Snow was responding to Alcorta's complaint of denial of access to her legal papers. I find that the *Glover* access-to-court ruling covers Snow's work on behalf of Alcorta. I therefore find it compensable. Plaintiffs' motion regarding fees for work performed on behalf of Fair and Alcorta is GRANTED.

Likewise, defendants argue that plaintiffs' attorneys' lobbying efforts to secure greater funding for education of female prisoners is outside of the scope of this case. As I held in my November 27, 1989 opinion and order: "Defendants have argued in the past that insufficient appropriations prevent them from complying with my orders. plaintiffs' lawyers would be remiss if they had not attempted to remove this barrier to compliance." Opinion at 7. Accordingly, I find hours spent on this issue to be reasonable and compensable. *DeMeir v. Gondles*, 676 F.2d 92, 93-94 (4th Cir. 1982).

Third, defendants claim that plaintiffs' hourly rate of $150.00 is excessive and unsupported by market rates of attorneys with similar qualifications in similar types of cases. Defendants assert that the rate was not approved by this court for court time or monitoring. In my November 27, 1989

[5] These activities totalled 2.35 hours over the six-month period.

opinion and order I addressed this issue thoroughly and approved a compensation rate of $135.00 per hour for plaintiffs' attorneys. I find no reason to alter that rate at this time.

Fourth, defendants argue that plaintiffs do not distinguish among monitoring, non-trial legal work, and trial activities. The parties have agreed that plaintiffs' attorneys shall be compensated at the rate of $115.00 per hour for time spent monitoring defendants' compliance with my orders in this case. I have also approved a rate of $135.00 per hour as compensation for legal work performed by plaintiffs' attorneys. This division is sufficient for the purposes of determining attorney fees. In future requests for fees, plaintiffs' attorneys shall distinguish between monitoring and legal work.

Fifth, defendants assert that legal assistant fees should be included in the attorney hourly rate as overhead, not charged separately. Cases addressing this issue clarify that legal assistant fees are a reasonable cost of practicing law and should be compensated in attorney fee awards. *Missouri v. Jenkins*, 109 S. Ct. 2463, 2470-72 (1989). I therefore GRANT plaintiffs' request of 5.50 hours of legal assistant hours, which were actually performed by Snow, and billed at a rate of $40.00 per hour.

Sixth, defendants object to costs requested by plaintiffs. As I find plaintiffs' costs necessary and reasonable, I hereby GRANT them in the amount of $5212.68.

For the foregoing reasons, plaintiffs' motions are GRANTED as follows: This court hereby GRANTS monitoring fees of $1702.00 for LaBelle, representing 14.8 hours billed at a rate of $115.00 per hour, and $1966.50 for Snow, representing 17.1 hours billed at a rate of $115.00 per hour; GRANTS plaintiffs' motion for settlement of attorney fees in the amount of $16,632.00 for LaBelle, representing 123.2 hours billed at a rate of $135.00 per hour, and $34,705.75 for Snow, representing 255.45 hours billed at a rate of $135.00 per hour, and 5.50 hours of legal assistant time billed at a rate of $40.00 per hour; and GRANTS costs in the amount of $1335.02 for LaBelle and $3877.67 for Snow.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: May 21, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

MARY GLOVER, et al.,

Plaintiffs

v.

No. 77-CV-71229-DT
Hon. John Feikens

PERRY JOHNSON, et al.,

Defendants.
_____/

OPINION AND ORDER

Before me is Plaintiffs' Motion For Settlement Of Attorney Fees And Costs. First, plaintiffs' counsel seeks reimbursement for 3.0 hours expended by Martin Geer and .1 hours by his paralegal on the issue of double bunking at the Scott facility. Second, plaintiffs' counsel seeks an increase in the hourly rate of compensation, from $135.00 an hour to $165.00 an hour. Except for these amounts in dispute, defendants paid all attorney fees owed at the current rate of $135.00 for the six-month period ending June 30, 1992.

Oral argument was held on November 12, 1992. At that time, I ruled that defendants were not required to reimburse plaintiffs' counsel for the time spent on the issue of double bunking because that is not at issue in this case. I now move to plaintiffs' request for a fee increase.

In 1989, plaintiffs requested a fee increase from the prior rate of $115.00 an hour to $150.00 an hour. I granted plaintiffs' counsel an increase to the present level of $135.00 per hour. The U.S. Court of Appeals for the Sixth Circuit affirmed my ruling. *Glover v. Johnson*, 934 F.2d 703, 716 (6th Cir. 1991).

The determination of a reasonable hourly rate is reached by calculating the prevailing market rates in the relevant

community. *Blum v. Stenson*, 46 U.S. 886, 895 (1984). In Blum, the United States Supreme Court stated that:

> It is intended that the amount of fees awarded under (1988) be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be nonpecuniary in nature.

Id. at 898.

At the hearing on this motion held on November 12, 1992, I asked the parties to provide me with information on attorney fee hourly rates awarded in prisoner civil rights cases by other judges in this district.

In a complex prisoner civil rights case before me,*Hadix, et al. v. Johnson, et al.* (Case No. 80-73581), plaintiffs' counsel Michael Barnhart currently receives attorney fees at the rate of $150.00 per hour. In *Prisoner's Progress Association v. Brown* (Case No. 76-72416), Judge George E. Woods accepted Magistrate Judge Thomas Carlson's Report and Recommendation on July 31, 1992 awarding plaintiffs' counsel fees at $150.00 per hour. Similarly, in *Johnson v. Worley* (Case No. 89-73335), Judge Avern Cohn awarded plaintiff's counsel Daniel Manville $150.00 per hour on June 16, 1992.

From this information, I conclude that the prevailing market rate in this district for prisoner civil rights cases for attorneys with Martin Geer and Deborah LaBelle's experience is $150.00 an hour.

Therefore, IT IS HEREBY ORDERED that Plaintiffs' Motion For Settlement Of Attorneys Fees is GRANTED in part and DENIED in part as stated herein.

John Feikens
United States District Judge

Dated: Dec. 17, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al.,

Plaintiffs,

v. Civil Action No. 77-71229

PERRY M. JOHNSON, et al., Hon. John Feikens

Defendants.
_____/

OPINION AND ORDER REGARDING
PLAINTIFFS' MOTION FOR ATTORNEY FEES

Attorneys for the plaintiff class have petitioned for an award of attorney fees for the period of July 1, 1995 through December 31, 1995. Defendants initially object to the payment of the fees, claiming that the Prison Litigation Reform Act of 1995 ("the Act" or "PLRA"), which became effective April 26, 1996, is retroactive in its application to attorney fees in cases such as this. Attorneys for the plaintiff class contend in opposition that that Act is not retroactive, is prospective, and does not, therefore, affect the petition for fees in the period covered.

It is necessary for me, therefore, to make a determination whether that Act has retroactive application to attorney fees.

The intent of Congress for the application of the attorney fees provisions of PLRA is not clear. Plaintiff class argues that Congress intended prospective application of the attorney fees provisions of the PLRA since only one of the ten sections of PLRA explicitly provides for its application to pending cases. As evidence, they assert that the attorney fees provisions were included in the section applying to pending cases when the bill was passed by the House of Representatives, but transferred to another section before the bill was signed into law. Plaintiff class' inference does not constitute a plain showing of congressional intent.

If a statute were to operate retroactively, there is a presumption that it does not govern absent clear congressional intent favoring such a result. *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1505 (1994). To determine whether a statute operates retroactively,

> The court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 114 S.Ct. at 1499.

This statute does not apply to the fees in question that have not been paid. If it did, it would modify the negotiated agreement between the parties in regard to payment for services. Both parties have been working for many years according to the settled orders of this court both for the payment of fees and also for the monitoring of fees. Application of this law would have a retroactive effect in its disruption of the established expectations of the parties, and again there is no evidence of statutory intent to affect that arrangement.

The essence of the defendants' contention is that a grant of attorneys' fees is prospective in nature and does not affect the substantive rights of the parties. The awarding of fees to a prevailing party, however, does not present the same issues as the taking away of fees from a prevailing party because of a recently-passed statute. In this case, work has been done and fees have been paid pursuant to the orders of this court for almost a decade. Thus the application of PLRA is not prospective in nature because it takes away fees already earned, which would in turn adversely affect the substantive rights of the plaintiff class. The cases cited by the defendants are therefore inapposite to the issues presented by application of PLRA to this case.

Having determined that the Prison Litigation Reform Act of 1995 is not retroactive in its application and, therefore, does not affect attorney fees generated and presented for the period of July 1, 1995 through December 31, 1995, I must now determine what fees are to be paid.

Multiple briefs have been filed and a hearing was held on May 7, 1996 on these issues. The petition for fees relates to the services both of Michael Barnhart and Deborah LaBelle.

Defendants make the following objections:

1. They object to time spent by Deborah LaBelle and Michael Barnhart, counsel to the plaintiff class, in consulting, conferring, or discussing matters between themselves. The hours objected to are thirteen in a period of six months between July 1, 1995 through December 31, 1995. Again, as I have in the past, I find that these hours "given the magnitude and the complexity of this case, [that] such consultation is at least reasonable and probably necessary." See *Glover, et al. v. Johnson, et al.* November 27, 1989 Opinion and Order, p. 6, and *Glover, et al. v. Johnson., et al.*, 935 F.2d 703, 716-717 (1991). A similar ruling is applicable here and, thus, the objection of the defendants to the payment of these hours is overruled.

2. Defendants object to the payment of fees incurred in the U.S. Court of Appeals for the Sixth Circuit appellate cases involving these parties, being Appeal Nos. 95-1903, 95-2037 and 95-2120. These appeals all stemmed from this court's orders establishing a Compliance Committee in order to achieve finality in this case. It was this court's purpose, because of the excessive litigiousness that surrounded compliance with this court's orders, that a new approach be taken. That approach was to "take the lawyers out of the case" and have the Wardens of the two women's prisons, the Special Administrator, the Court Monitor and a representative of the plaintiff class meet and resolve these complex issues. The Committee members were unable to reach any agreement and, thus, it was necessary to disband this approach. When the court vacated its orders establishing the Compliance Committee, plaintiff counsel filed a motion to dismiss these

appeals that the court's order had generated. Initially the defendants opposed the dismissal but then, on stipulation, agreed to voluntarily dismiss the appeals. This was done only after the submission of briefs in the Sixth Circuit.

Even though defendants objected to the court's orders for a Compliance Committee to attempt to achieve finality in the case and appealed these orders, which they subsequently voluntarily dismissed, they argue that the plaintiff class is not the prevailing party and, therefore, the fees cannot be ordered paid.

The argument is rejected, and the defendants are ordered to pay all fees in Appeal Case Nos. 95-1903, 95-2037 and 95-2120.

3. In Appeal Case No.94-1617, in which the court of appeals ruled against the contention of the plaintiff class that inmate parental custody cases require legal assistance, that case, I am informed, is now the subject of a petition filed by the plaintiff class for *certiorari* to the U.S. Supreme Court. Thus, even though I am aware of a substantial argument that the plaintiff class makes for payment of fees involved in this matter, I am of the opinion that this matter should be stayed to conform to the Sixth Circuit's stay while the petition for *certiorari* is pending.

It appears that a similar ruling is applicable to Appeal Case No. 95-1521, which is still before the Sixth Circuit. Here also the argument is made by plaintiffs' class counsel that the prevailing party doctrine does not apply, as defendants argue it should; but, the matter of fees is best stayed until the Sixth Circuit has resolved the issue involved in the appeal on the merits.

4. Defendants object to the payment of 11.15 hours, which they argue concerns issues not related to the *Glover* case. It appears that defendants are engaged in hair-splitting. One so-called non-*Glover* issue arose out of a claim of retaliation by an inmate, a member of the class who claimed that her jewelry had been confiscated as contraband after she participated in this case; and another inmate similarly situated was apparently removed from her prison detail. Plaintiffs' class

counsel pursued these matters with defendants' counsel, and I am informed that both these actions were reversed. Another claimed issue on retaliation involved complaints with regard to excessive heat at Camp Branch. The complainants were two women inmates who received "misconducts" for complaining; and, when plaintiffs' class counsel brought this issue to defendants' counsel, the two women inmates did receive rehearings and their "good time" credits were restored. A third so-called non-*Glover* issue involved plaintiffs' class counsel Michael Barnhart's appearance at legislative hearings. Barnhart appeared at the legislative hearings because matters regarding the *Glover* case were discussed by the Director of the Department of Corrections. It appears to me that Barnhart properly acted in monitoring these matters inasmuch as they relate directly to this case.

Thus, the objection of defendants to the payment of 11.15 hours to plaintiffs' class counsel is overruled.

5. The final matter in the petition for fees relates to a total of 50.05 hours paid to Gale Greiger as a paralegal. I have previously ruled on this matter of paralegal assistance. See my Opinion and Order dated May 20, 1990 and December 21, 1990, neither of which was appealed.

Accordingly, the objection by the defendants to the payment of 50.05 hours of the paralegal at the rate of $45 an hour is overruled.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: 6/3/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, *et al.*,

Plaintiffs, Case No. 77-71229

vs. Hon. John Feikens

PERRY JOHNSON, *et al*

Defendants. Filed
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OPINION AND ORDER

I. BACKGROUND

In an opinion and order filed December 4,1996, I held that the relevant provisions of the Prison Litigation Reform Act, 18 U.S.C. § 3626 ("PLRA" or "the Act") setting a cap on fees in prison litigation cases apply in this case to hours worked by plaintiffs' attorneys after April 26, 1996, the effective date of the Act. Plaintiffs now move for reconsideration, for clarification, and for an evidentiary hearing to argue and present facts that the Act unconstitutionally violates prisoners' rights of equal protection.[1] Accepting *arguendo* plaintiffs' proposed facts as proven. I conclude that the attorney fee provisions in the PLRA do not violate plaintiffs' rights of equal protection. I therefore deny plaintiffs' motion for reasons stated below, and do not deem it necessary to hold an evidentiary hearing or

[1] Plaintiffs also request clarification of the December 4, 1996 order with regard to payment of unobjected to fees which remain outstanding. That order for payment of fees includes fees for which found defendants' objections to be without merit as well as outstanding fees for which defendants made no timely objections. This represents 63.35 hours for Deborah LaBelle, 34.25 legal assistant hours, and 30 hours for Jeffrey Dillman.

inform the U.S. Department of Justice, pursuant to 28 U.S.C §2403(a) of the constitutional arguments raised against the PLRA.

II. ANALYSIS

The provision at issue in this case provides.

> No award of attorney's fees in an action [brought by a prisoner in which attorney fees are authorized] shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

§803(d)(7)(d)(3). The effect of this provision is to reduce the rate for plaintiffs' counsel to $112.50 per hour for hours worked after the Act's enactment from the rate of $150 per hour established years ago in this case pursuant to a remedial plan proposed by defendants.

Plaintiffs contend that the actual effects of the attorney fee provisions are far more reaching. Specifically, they offer to prove the following points:

> a. that the majority of prisoner lawsuits filed in the federal courts are filed *pro se;*
>
> b. that the majority of frivolous prisoner lawsuits are dismissed by the federal courts prior to the appointment of counsel;
>
> c. that the PLRA's attorney fee provisions will have no impact on limiting frivolous prisoner lawsuits filed in the federal courts, as most such suits are *pro se;*
>
> d. that to the extent that the PLRA's fee provisions are intended to limit frivolous prisoners lawsuits, it is not rationally related to this goal as attorney fees are awarded only to

prevailing parties who have filed meritorious suits;

e. that at both a national and local level, there is an insufficient pool of qualified counsel to represent prisoners in civil rights lawsuits, particularly in class action suits;

f that one of the effects of the PLRA's fee provisions will be to further limit and discourage qualified counsel from representing prisoners in meritorious civil rights lawsuits filed to address constitutional violations;

g. that $112.50 is well below the prevailing market rate for specialized civil rights litigations';

h. the PLRA fee provisions will further limit and discourage counsel from representing prisoners in meritorious civil rights claims where constitutional violations exist:

i. that to the extent that the PLRA's fee provisions are intended to have a positive impact on the judicial economy and efficiency of federal courts, it is not rationally related to this goal as it does not affect the vast majority of cases and it deprives the courts of qualified competent counsel who can represent the plaintiffs in these suits in either a class or individual capacity;

j. that to the extent the PLRA was intended to limit federal court access in prisoner rights cases, plaintiffs as prisoners wishing to bring a civil rights lawsuit in Michigan state courts must still raise a claim under the federal civil rights statute, 42 U.S.C. §1983 as Michigan courts have not yet ruled on whether a state analog to the federal civil rights act exists for Michigan prisoners;

l. that under the removal statute, 42 U.S.C. §1441, *et seq.*, a defendant may remove to federal court such a suit filed in a state court;

m. that in virtually every prisoner civil rights case initiated in Michigan state courts, the Michigan Department of Corrections, as well as its employees, have attempted to remove the case to federal courts;

n. that to the extent that the PLRA's fee provisions are intended to limit federal court jurisdiction over prisoner civil rights suits, it is not rationally related to this goal, as such claims may be, and routinely are, removed to federal courts regardless of the initial choice of venue that the plaintiff makes;

o. that the PLRA's fee provisions may limit federal courts' authority under their inherent equitable powers, as well as under the Federal Rules of Civil Procedure, by limiting the amount of fees and sanctions that may be imposed against a party by capping plaintiffs' counsel's hourly rates;

p. that to the extent that the PLRA's fee provisions limit federal courts' authority under these provisions they further violate the Equal Protection Clause of the United States Constitution by limiting the sanctions only in prisoner rights cases for contemptuous and/or sanctionable behavior.

(Plaintiffs' Motion for Reconsideration, Dec. 17, 1996, 3-4.) In short, plaintiffs present three possible intentions of Congress: 1) to limit frivolous prisoner lawsuits, 2) to have a positive impact on the judicial economy and efficiency of federal courts, and 3) to limit federal court access in prisoner rights cases. Since the attorney fee provisions are not rationally related to any of these goals, according to plaintiffs, the PLRA violates prisoners' equal protection rights.

I note that plaintiffs are contesting the action of Congress, not a state, and thus the Fourteenth Amendment is not at issue. Plaintiffs' rights to equal protection are merged into their Fifth Amendment right not to be denied a liberty interest without due process of law. "Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process." *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 173, n.8 (1980), *quoting Schneider v. Rusk*, 377 U.S. 163, 168 (1964).

To the extent that plaintiffs are correct in their analysis of Congress's reasons for including the attorney fee provisions in the PLRA, I agree that this law will ultimately have the opposite effect of their intended goal of curtailing frivolous lawsuits. As competent attorneys are forced to the sidelines by the fee diminution, more *pro se* lawsuits will take center court. Judicial resources will inevitably be squandered in an attempt to make sense of the *pro se* complaints that could have been more effectively marshalled and presented by counsel.

I am therefore reluctant to enforce this provision; however, my inquiry cannot focus on the wisdom of this provision:

> It is not the mission of this Court or any other to decide whether the balance of competing interests...is wise social policy.... [W]e cannot, in the name of the Constitution, overturn duly enacted statutes simply because they may be unwise, improvident, or out of harmony with a particular school of thought... Rather, when an issue involves policy choices as sensitive as those implicated here, the appropriate forum for their resolution in a democracy is the legislature.

Harris v. McRae, 448 U.S. 297, 326 (1979) (internal citations omitted). Since "Congress has neither invaded a substantive constitutional right or freedom, nor enacted legislation that purposefully operates to the detriment of a suspect class, the only requirement of equal protection is that congressional action be rationally related to a legitimate governmental

interest. *Id.*

Congress possesses the power to limit the amount of fees allowed in a civil rights suit just as it possesses the underlying power to shift payment of fees to a prevailing party. Thus, there is no conflict with separation of powers principles. Furthermore, the PLRA's limitations on fees are rationally related to a legitimate governmental interest in limiting access to the coffers of the state. I therefore find that § 803(d)(7)(d)(3) of the Prison Litigation Reform Act does not violate prisoners' rights to equal protection under the laws.

III. CONCLUSION

ACCORDINGLY, IT IS ORDERED that plaintiffs' motion for reconsideration, for clarification, and for evidentiary hearing is denied.

IT IS SO ORDERED.

John Feikens
United States District Judge

Dated: Jan 31, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, *et al.*,

Plaintiffs,

vs.

PERRY JOHNSON *et al.*,

Defendants.
_____/

Case No.77-71229
Hon. John Feikens

Filed
Feb 6 3:32 PM '97

OPINION

I. BACKGROUND

In this motion, plaintiffs request costs for work performed on two appeals to the United States Court of Appeals for the Sixth Circuit and one petition for writ of *certiorari* to the United States Supreme Court.[1] Defendants have denied payment for these costs and fees on the basis that plaintiffs were not the prevailing party on these issues.

As a result of prevailing at trial, plaintiffs became entitled to fees and costs for work provided in this case pursuant to 42 U.S.C. §1988. It has long been established as the law of this case that plaintiffs do not need to be the prevailing party on each and every issue in order to be entitled to fees. Memorandum Opinion and Order, November 27, 1989, at 4; *Clover v. Johnson*, 934 F.2d 703, 715 (1991). The law of this circuit holds that plaintiffs are entitled to fees if the work performed by counsel was reasonably related to

[1] Specifically, these are identified as Sixth Circuit Appeals Nos. 95-1521 (Defendants' appeal regarding Defendants' Motion to Modify the Termination Language in the Remedial Plan) and 94-1617 (Defendants' appeal regarding contempt and access to courts for parental rights matters), and Supreme Court No. 95-1935 (Plaintiffs' petition for *certiorari* regarding contempt and access to courts for parental rights matters).

ensuring compliance with the judgment on which they originally prevailed: "Services devoted to reasonable monitoring of the court's decrees, both to insure full compliance and to ensure that the plan is indeed working.. .are compensable services. They are essential to the long-term success of the plaintiff's suit." *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 637 (1979).

For reasons stated below, I conclude that these three appeals contested by defendants all involved issues reasonably related to monitoring compliance with the Remedial Plan entered in this case.

II. ANALYSIS

Two appeals (Sixth Circuit Appeal No.94-1617 and Supreme Court No. 95-1935) can be treated as one, for they both involve appeals of my order that defendants could not unilaterally terminate funding for legal assistance to prisoners in parental rights matters. Defendants argue that this issue was not reasonably related to the Remedial Plan and cite the reference in my opinion on this issue as a "a new issue" of "the constitutional right of female inmates to legal assistance and access in the area of parental rights." *Glover v. Johnson*, 850 F. Supp. 592, 592-93 (E.D. Mich. 1994).

In that same opinion, however, I explained at length how the right of prisoners to legal access on these matters was deeply rooted in the Remedial Plan and the consequent orders of this court:

> On January 6, 1992, defendants entered into a one-year contract with [Prison Legal Services to provide assistance in various areas including child custody, child visitation and parental neglect... This contract, and the services provided thereunder, was specifically entered into for the purpose of complying with this court's previous orders. Its *Statement of Purpose* is significant:
>
> Whereas the STATE desires to establish a system that will provide indigent female

> offenders currently incarcerated at the.. Facility with selected legal services as *ordered by the court* in *Glover v. Johnson*.

Id. at 594 (emphasis in original). I also noted that the contract specifically provided that legal services were to be provided for "domestic relations including divorce, child custody, visitation disputes, and child neglect actions;" and that such services had been provided to prisoners for years. *Id.* I therefore held defendants in contempt of this court's orders for unilaterally eliminating this assistance. Thus the issue of legal assistance in parental rights matters was directly connected with the Remedial Plan and the consequent orders of this court.

When faced with the termination of this assistance, plaintiffs raised a constitutional issue against such action. The originality of that argument does not detract from the reasonable relation it bore to monitoring defendants' compliance with the Remedial Plan. "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1982). Plaintiffs' counsel are therefore entitled to fees for work provided on these appeals.

The other appeal for which defendants are contesting fees (Sixth Circuit Appeal No.95-1521) involved defendants' motion to modify the provisions of the Remedial Plan dealing with the power of the court monitor and the termination of the plan. In essence, the relief sought amounted to a complete termination of the Remedial Plan. Work provided by plaintiffs' counsel on this issue was therefore critically related to monitoring compliance with the judgment, and plaintiffs are certainly entitled to fees on this issue.

III. CONCLUSION

Accordingly, plaintiffs' motion for settlement of post-judgment appellate fees and costs along with interest, is granted. Plaintiffs should submit to this court a recalculation of fees in the form of an order pursuant to this opinion.

John Feikens
United States District Judge

Dated: Jan. 31, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER. *et al.*,

Plaintiffs, Case No. 77-71229
vs. Hon. John Feikens

PERRY JOHNSON, *et al.*,

Filed
Defendants. Feb 6 3:32 PM '97

_____/

ORDER GRANTING DEFENDANTS' MOTION FOR APPROVAL OF DEFENDANTS' BOND STAYING JUDGMENT ON APPEAL

Defendants having filed a motion requesting that the Court approve a bond effecting a stay of the Court's December 4, 1996 Opinion and Order, and the Court having reviewed the pleadings;

IT IS HEREBY ORDERED that Defendants' motion is granted and that a surety for the total sum of attorney fees and costs bond be set in the amount of ten percent of the total sum of attorney fees and costs awarded in this Court's Opinion and Order of December 4, 1996;

IT IS FURTHER ORDERED that, upon Defendants' depositing with the Court such ten percent bond, this Court's judgment of December 4, 1996, which is currently on appeal be stayed.

John Feikens
United States District Judge

Dated: February 6, 1997

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1998 FED App. 0072P (6th Cir.)
File Name: 98a0072p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

_____

Mary Glover; Lynda Gates; Jimmie Ann Brown; Manetta Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

Nos. 95-1521;
96-1852/1931/1948

v.

Perry Johnson, Director, Michigan Department of Corrections; Florence R. Crane; G. Robert Cotton; Thomas K. Eardley, Jr.; B. James George, Jr.; Duane L. Waters; The Michigan Corrections Commissions; William Kime, Director, Bureau of Programs; Robert Brown, Jr., Director, Bureau of Correctional Facilities; Frank Beetham, Director, Bureau of Prison Industries;

Richard Nelson,
Director, Bureau of Field Services;
Gloria Richardson, Superintendent,
Huron Valley Women's Facility;
Dorothy Costen, Director of
Treatment, Huron Valley Women's
Facility; and Clyde Graven,
Sheriff, Kalamazoo County;
individually and in their official capacities,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 77-71229--John Feikens, District Judge.

Argued: March 13, 1997

Decided and Filed: March 2, 1998

Before: WELLFORD, RYAN, and DAUGHTREY,
Circuit Judges.

COUNSEL

ARGUED: Susan Przekop-Shaw, Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, for Appellees. ON BRIEF: Leo H. Friedman, Kim G. Harris, Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL, CORRECTIONS DIVISION, Lansing, Michigan, for Appellants. Deborah A. LaBelle, LAW OFFICES OF DEBORAH LABELLE, Ann Arbor, Michigan, Michael Barnhart, Detroit, Michigan, for Appellees.

RYAN, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. WELLFORD, J. (pp. 52-56), delivered a separate opinion concurring in part and dissenting in part.

OPINION

RYAN, Circuit Judge. More than 20 years ago, two separate groups of plaintiffs brought class actions under 42 U.S.C. § 1983 on behalf of all female prison inmates in Michigan. Since then, almost all of the principal players, plaintiffs and defendants alike, have departed the scene through retirement, death, or release from prison. But the two cases live on, and judging from the arguments of the parties and the extensive opinions of the district court, we are not appreciably closer to a resolution than we were two decades ago and the end does not appear to be in sight.

In one of the two suits, which were consolidated by the district court, the plaintiffs challenged "the entire range of treatment programs for female prisoners including educational opportunities, vocational and apprenticeship training, prison industry and work pass programs, wage rates, and library facilities as compared to those offered to male prisoners," as violating the Equal Protection Clause of the Fourteenth Amendment. *Glover v. Johnson*, 478 F. Supp. 1075, 1077 (E.D. Mich. 1979). In the second case, the plaintiffs "claimed that their rights to equal protection and their right to access to the courts ha[d] been violated by [the State of Michigan's] failure to provide the female prisoners . . . an adequate law library comparable to those provided for male prisoners." *Id.* at 1094. After a lengthy trial, the district court found for the plaintiffs in both cases, entered a remedial "Final Order," and has been supervising these aspects of the Michigan women's correctional system ever since. During the course of the district court's supervision, we have entertained more than a dozen appeals; now, the case is before us once again. This time we are presented with three separate appeals which we have consolidated for decision. We are asked to review the district court's judgments (1) denying the defendants' motion to terminate the district court's oversight of the female inmates' educational and vocational opportunities and their access to the courts; (2) granting, in part, the plaintiffs' motion to impose contempt sanctions against the defendants; and (3) granting the plaintiffs' motion for attorney fees.

For reasons we will fully explain, we conclude that the judgment of the district court in the first appeal, concerning termination of judicial oversight, must be vacated, and the matter remanded for further proceedings. We will retain jurisdiction. The district court's judgments imposing contempt sanctions and attorney fees will be affirmed in part and reversed in part, and these matters too will be remanded for further proceedings, but as to these, we will not retain jurisdiction.

I.
INTRODUCTION

Despite the district court's patient, dedicated, and persistent effort over the long history of this lawsuit, it has been unable to accomplish the two tasks before it: (1) achieving compliance on behalf of Michigan's women prisoners with Fourteenth Amendment equal-protection guarantees and with First Amendment access-to-court guarantees, and (2) terminating the federal-court supervision of Michigan's women's prison system. The first of these tasks, of course, is also the plaintiffs' goal in filing this lawsuit; it became the district court's task when the plaintiffs prevailed on the merits in 1979. The second task, on the other hand, is simply a necessary corollary to any extended federal-court oversight of State matters.

With all due respect, we believe the district court's inability to achieve these two tasks stems in large part from the court's loss of proper perception regarding its role. Very substantially because of unfocused and misdirected advocacy by both sides in this litigation, and particularly because of the recalcitrant defendants' foot-dragging, the district court has been preoccupied with attempting to force the defendants to comply with the details, even the minutiae, of the intermediate methodologies the court has devised for remedying the constitutional deficiencies it found in 1979. The court has lost sight of the forest for its long-time attention to the trees.

We write today not only to decide the specific questions presented by these appeals, but also to clarify the district court's dual missions and, in the process, refocus the attention

of all concerned on the tasks at hand: remedying the constitutional infirmities the district court found existed in 1979, and terminating this litigation as speedily as possible.

II.
BACKGROUND

The protracted history of this case has been sketched on many occasions in the published opinions of the district court and this court. In lieu of still another detailed recitation, we will restate only those facts necessary to an understanding of these consolidated appeals, and leave the reader to the multiple other opinions in order to fill the interstices. But that having been said, in order to afford the reader an adequate understanding of the basis for our decision today, we must nevertheless burden this opinion with a rather extensive review of the district court's orders and the parties' efforts at complying with them.

In 1979, the district court conducted a 10-day bench trial, after which it issued a lengthy opinion holding both that "[s]ignificant discrimination against the female prison population occurs in several areas of programming . . . in violation of the Fourteenth Amendment," *id.* at 1083, and that the prisoners' right of access to court was impeded not because there was no law library one was provided and it was adequate but by the need for legal training, see *id.* at 1097. Two years later the court's judgment was supplemented with a "Final Order," which the district court characterized as "the culmination of lengthy negotiations" between the court and the parties, and which set forth in considerable detail the required remedial actions. See *Glover v. Johnson*, 510 F. Supp. 1019, 1020 (E.D. Mich. 1981). The court also stated its intention to "retain[] jurisdiction until it is satisfied that the terms of the Orders have been complied with in all respects." *Id.* The defendants did not file appeals to this court from either the 1979 judgment or the 1981 "Final Order."

For seven or eight years following the issuance of the Final Order, the parties were repeatedly before the district court, and before this court a number of times, debating the efficacy of the district court's order seeking to achieve the constitutionality it found lacking in 1979, and the propriety of

several of the district court's enforcement methodologies. With each passing year the district court became increasingly less satisfied with the defendants' compliance.

Ultimately, but certainly not finally, in 1989, the district court issued a lengthy opinion and order, surveying the defendants' "unwillingness or inability to make progress towards implementing the programs ordered" at earlier stages of the case, and noting that the defendants had consistently "met the use, and threatened use, of [the district court's] contempt power with studied indifference." *Glover v. Johnson*, 721 F. Supp. 808, 812, 811 (E.D. Mich. 1989). The court made detailed findings with respect to the defendants' progress in six areas. The first area was access to the courts, and the remainder were five subcategories of rehabilitative programming: educational programming, vocational programming, apprenticeships, prison industry, and work-pass programs. It concluded that the defendants' efforts fell short of the mark. The court stated:

> In October 1979, I found the rehabilitative programming then afforded to the Department's female prisoners to be substantially inferior to that offered its male prisoners. I entered an order outlining the required remedy. In 1981, I supplemented that outline with a more detailed decree. That decree was captioned a "Final Order." Now, ten years later, female prisoners are still not receiving the type of equal programming to which they are entitled. As recounted . . . , the Department has failed to implement my orders in almost every respect.

Id. at 849. Therefore, the court imposed a specially crafted contempt remedy providing for the appointment of a Special Administrator and a Compliance Monitor, which it felt represented the best hope of attaining the "elusive" goal of parity. *Id.*

The defendants appealed this order, but without notable success. In May 1991, this court issued its decision in *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991), holding, among other things, that

> the district court did not abuse its discretion in holding defendants in contempt for non-compliance with the court's 1981 order. We also conclude that the district court's order requiring defendants to appoint a special administrator to develop a remedial plan is not an excessively intrusive remedy.

Id. at 705. We elaborated: "The district court did not abuse its discretion in requiring defendants to appoint an administrator to develop the remedial plan," especially in light of the fact that "[t]he history of this case shows a consistent and persistent pattern of obfuscation, hyper-technical objections, delay, and litigation by exhaustion on the part of the defendants to avoid compliance." *Id.* at 715.

Following this decision, the district court appointed Nancy L. Zang to serve as "Special Administrator of Female Offender Programs," and Dr. Rosemary Sarri to serve as Compliance Monitor. In December 1991, the defendants submitted to the district court a Remedial Plan and a Plan for Vocational Programs and Work Pass, both of which plans had been prepared by Zang at the direction of the district court. The plans assertedly were "intended to assure the constitutionality of the programs provided to female offenders at Crane Correctional Facility, Huron Valley Women's Correctional Facility, Scott Correctional Facility, and Camp Gilman." These institutions, at the time, comprised all of the prison facilities for women in Michigan, although the number, size, and character of the female inmates' facilities have since changed. The plans summarized the court's previous orders, as well as the actions already taken and those proposed by the defendants, and set forth a "project tracking system to facilitate an ongoing review and evaluation." The Remedial Plan contains the following language with respect to implementation, compliance, and termination:

> Implementation
>
> Defendants shall implement this remedial plan in accordance with its terms on or before two (2) years from the date of its approval by the

Court.

. . . .

Compliance Monitor

Defendants shall monitor the binding provisions of the Remedial Plan. Defendants shall file with the Court and serve upon the Court Monitor and Plaintiffs' counsel quarterly monitor reports until the filing of the final monitor report described herein. The monitor reports shall include the compliance status and the progress of each binding provision set forth in this remedial plan.

Within one hundred and twenty (120) days of the expiration of the two (2) year implementation period, Defendants shall file with the Court and serve upon the Court Monitor and Plaintiffs' counsel a final monitor report describing the compliance status of each binding provision set forth in this remedial plan. After filing of the final report, monitoring of the remedial plan shall terminate.

Termination

Defendants shall be in substantial compliance where 75% or more of the binding provisions in each program area set forth in this remedial plan are found in compliance in the final monitor report. Where the final monitor report reflects substantial compliance with the binding provisions in one or more program areas, the jurisdiction of the Court shall be terminated for each of the compliant areas thirty (30) days from the filing of the final monitor report, unless Plaintiffs file a Motion requesting extension of the Court's jurisdiction due to existence of constitutional violations with the program areas set forth in this remedial plan.

The Plan for Vocational Programs and Work Pass contains similar language.

The Remedial Plan proposed the following actions for the following areas, along with a proposed time line for achieving the goals:

Access to the Courts: establish paralegal trainee pay scale; law library status reports due; continue Huron Valley Women's Facility/ Jackson Community College paralegal program; contract and deliver training through Kellogg Community College; contract and deliver training through University of Detroit-Mercy; implement eligibility criteria; and establish a method to determine if a sufficient pool of writ writers exists.

Educational Programming: assessment develop guidelines, train staff; planning develop individualized program plan (IPP) guidelines, design IPP, train staff; develop IPPs for women in associate and baccalaureate degree programs; education files develop standards; develop postsecondary criteria for enrollment/ participation; develop information process; develop procedures for course/degree selection; continue associate and baccalaureate programs at Crane; continue associate program at Scott; begin baccalaureate programming at Scott; establish Jobs Education and Training Council.

Apprenticeships: determine program viability at Crane Women's Facility and Scott Correctional Facility; seek court approval for apprenticeships at Crane, Scott, and Huron Valley; modify Joint Apprenticeship and Training Committee at Crane if necessary; establish Joint Apprenticeship and Training Committee at Scott; modify/prepare standards at Crane and Scott; inform, recruit, select and implement apprenticeships at Crane and Scott; determine viability for Huron Valley apprenticeship trans-

> fer to Scott; develop plans/paperwork relative to Huron Valley closing; and develop monitoring scheme.

The precise goals for vocational and work-pass programs are as follows:

> Vocational Programs: Review and update curricula; develop guidelines for prerequisite skills; develop IPPs for all vocational students; develop offender profile; design and conduct vocational interest survey; identify viable vocational programs; and develop strategies and implement new programs.
>
> Work Pass: Simply proposes that the work pass program "will continue to be offered," with no modifications, because as of December 2, 1991, 29% of eligible women participated, compared with only 12.3% of eligible men.

Nowhere in the plans was there any mention of the rehabilitative educational- or occupational-training opportunities then being provided to male inmates, the criterion against which the district found a denial of equal protection 12 years earlier.

The plaintiffs objected to the plans on the grounds that they (1) failed to address issues that were part of the court's prior orders; (2) failed to include proposals to remedy constitutional violations found by the court in its 1989 order; and (3) failed to fully explain the defendants' plan to remedy the issues that were addressed. The defendants apparently responded to the plaintiffs' objections, but never revised their plans. They never, moreover, sought court approval of their plans. And most significantly, the district court never entered an order adopting the proffered plans.

A.
Motion to Terminate

In December 1993, the defendants filed a motion pursuant to Fed. R. Civ. P. 60(b)(5), seeking to modify the

compliance-monitor requirement and the termination language contained in both plans, even though neither had ever been the subject of court approval. Specifically, the defendants sought to change the existing termination language to provide that upon "court approval of the Remedial Plan, or any portion of the Remedial Plan, an order will immediately be entered terminating the court's jurisdiction over the applicable provisions."

The district court then held numerous days of hearings, attempting to ascertain the extent of the defendants' compliance. In March 1995, the district court issued its opinion denying the defendants' motion. See *Glover v. Johnson*, 879 F. Supp. 752 (E.D. Mich. 1995). The district court stated:

> [D]efendants' motion, in reality, seeks to terminate the Plans and to end the role of the Court Monitor. Thus, defendants seek to terminate the case itself. Defendants believe that implementation and monitoring of the Plans have been ongoing; therefore, there is no need for a compliance monitor, and no need to monitor defendants' conduct. Defendants believe the monitoring and reporting requirements outlined in the current Plans, in addition to what defendants have already been subject to during the pendency of approval of the Plans, substantially burden them. They argue that the motion should be granted because they have "substantially complied" with this court's previous orders and with the Remedial Plan and the Plan for Vocational Programs and Work Pass.

Id. at 755-56 (footnote omitted). The court then characterized the defendants' position as follows:

> Defendants argue that the court's active participation in the implementation and monitoring of defendants' compliance with the Plans constitutes changed factual circumstances which make compliance with the Plans more burdensome. Additionally, defendants assert

> that they did not anticipate that the following acts would take place prior to approval of the Plans: (1) that the court would give permission to implement the Plans while indefinitely delaying approval; (2) that they would be required to submit status reports and respond to numerous inquiries from plaintiffs' counsel; and (3) that the court would become involved in the implementation and monitoring of the Plans.

Id. at 756 (footnote omitted).

In deciding the motion, the district court first noted that Fed. R. Civ. P. 60(b), the rule under which the defendants made their motion, "is applicable only to final judgments and orders," and that the plans "are neither." *Id.* Nonetheless, the court reasoned, it could responsibly "adopt[] a substitute approach," and simply "assum[e] that the Plans had been de facto approved," and then "determine if defendants are currently in compliance with the Plans." *Id.* In that case, the requested modifications could be made if "the changed factual circumstances advanced by defendants warrant modification." *Id.* at 757.

The court conducted a review of the terms of the plans, and determined that the defendants were not in substantial compliance, and therefore denied the defendants' motion. We will paraphrase the district court's specific comments, as follows:

> 1. With respect to access to court, the court identified the following "deficiencies": "[N]o method has been developed to determine whether there exists an adequate pool of writ-writers in the prisons. Additionally, information is still lacking about the adequacy of writ-writers and their utilizations. . . . [T]here is no library currently at Camp Gilman nor a paralegal."
>
> 2. With respect to educational programming, the court observed: "[T]here still are women in

> college programming who do not have IPP's prepared. Additionally, there are a number of women who are prevented from taking a full twelve-credit course load because of space problems."
>
> 3. With respect to apprenticeships, the court identified five programs at Crane, and six at Scott, and noted the defendants' arguments that "they have not been able to fill three of the five Crane apprenticeships due to eligibility requirements," which have excluded approximately 100 women. Placing the blame on the defendants for this inability, the court concluded that the defendants "are clearly not in substantial compliance with the goals of apprenticeship programming as established in the Remedial Plan. Under the Plan, defendants are required to recruit and motivate women to participate in apprenticeship programming." The court suggested that the eligibility criteria employed by the defendants "may discourage women from even applying for apprenticeships."
>
> 4. With regard to vocational programming, the court characterized its earlier orders as requiring the defendants "to provide vocational programs at all facilities housing members of the plaintiff class." The court observed: "[A]s of June 1, 1994, there were eligible inmates who were not enrolled in vocational programming due to waiting lists. Additionally there are a significant number of women in camps who are not receiving vocational programming although their earliest release dates are more than a year away."
>
> 5. With regard to work-pass programs, the court found that "[t]here are currently no women being taken out on work pass." Moreover, the court found, "[t]here has been a continued decrease in the number of women

> going out on community residential placement," a "program [that] was structured to take the place of work pass." Finally, the court observed, work pass "programming is significantly reduced because of more stringent security requirements," and the defendants "have not proposed alternative programming to work pass" in recognition of this reduction.

Id. at 757-59 (footnotes and citations omitted).

Notably missing from the district court's lengthy opinion is any consideration whether, at the time the opinion was written, the educational, vocational, apprenticeship, and work-pass opportunities then being offered to women inmates were on a constitutional par with those then being offered to men. The court's overall conclusion with respect to the defendants' motion was that "[a]lthough defendants have made significant improvements in a number of areas . . . , they have not substantially complied with either of the Plans as a whole." *Id.* at 759-60.

To the district court's credit, it concluded its opinion with a discussion of "finality in these proceedings." *Id.* at 760.

> The perplexing issue is: How is finality reached in these public agency-public law cases? . . .
>
> As it is so often a need in the administration of justice, a balance must be reached. That balance is reached, it seems, when there is substantial compliance with the goals of . . . a negotiated settlement . . . . [T]hat requirement of compliance has not yet completely been reached. That fact may not be used, however, to avoid addressing finality. Even though progress has been slow . . . , there has been substantial progress toward finality.
>
> It is this court's view that a further test period is still required. That test period can be measured in a discrete time frame.

> This court, with the aid of its Monitor[], will determine within a period of sixty (60) days after December 31, 1996, whether compliance has been substantially accomplished. During the period prior to December 31, 1996, . . . the monitor[] will perform quarterly reviews which will be submitted to the court and the parties detailing the compliance status in each program . . . .

Id. (footnote omitted).

In April 1995, the district court entered the following order, pursuant to its March opinion:

> IT IS HEREBY ORDERED that Defendants' Motion to Amend or Modify the Compliance Monitor and Termination Language in the Remedial Plan and the Plan for Vocational Programs and Work Pass and Defendants' request to terminate the role of monitors and Court jurisdiction is DENIED;
>
> IT IS FURTHER ORDERED that until December 31, 1996[,] the Court Monitor shall submit quarterly reports detailing the status of Defendants' compliance with Court orders and the Plans to the Court and the parties;
>
> IT IS FURTHER ORDERED that within sixty (60) days after December 31, 1996[,] the Court, with the aid of the Monitor, shall determine whether compliance with Court orders and the Plans has been substantially accomplished through this procedure:
>
> 1. The Court would first review compliance under the Plans and would dismiss any portions of the Plans for which it found compliance.
>
> 2. The Court would entertain motions regarding the portions of the

> Plans for which the Court did not find compliance. In these motions the parties could argue the relevant constitutional standards and show that compliance with the full terms of the Plans should not be required.

From the April 1995 order, the defendants filed this timely appeal. Before discussing our conclusions with respect to this, the first of the three matters before us, we turn to the background underlying the second matter on appeal, the contempt proceedings.

B.
Contempt Proceedings

Following the district court's denial of the defendants' request for termination of the court's jurisdiction, the plaintiffs filed a number of motions claiming that the defendants were in contempt for their alleged continuing, and escalating, failure to comply with various district court orders. At first the district court declined to consider these contempt motions while it experimented with a "compliance committee" consisting of the Special Administrator, the wardens of the Crane and Scott facilities, a representative from the plaintiff class, and the Compliance Monitor. In January 1996, however, it abandoned the experiment, due to the "substantial resistance" of the defendants. The district court then scheduled another round of evidentiary hearings in connection with the still-pending contempt motions. Following the hearings, the court issued a lengthy opinion and order imposing contempt sanctions on the defendants because of their failure to comply, in several respects, with its earlier orders.

1.
a.
Access to the Courts

Addressing first the matter of the female inmates' right of access to the courts, the district court concluded that its "remedial orders requiring Defendants to provide Plaintiffs adequate access" were "embodied in the remedial plan" devised by the defendants in 1991. *Glover v. Johnson*, 931 F.

Supp. 1360, 1363 (E.D. Mich. 1996). The court described the pertinent portions of the remedial plan as follows:

> It provides, in conjunction with [a] Department of Corrections Policy Directive . . . , that all general population prisoners shall be entitled to use the main law library at each correctional facility for a[t] least six hours each week. It also requires Defendants to provide paralegal training "until such time as a sufficient pool of trained legal assistants is developed." Finally, the Defendants are required to establish a method to determine when a sufficient pool of inmate paralegals exists to meet the needs of the prisoner population.

Id. at 1363-64 (citations omitted).

In their motion requesting that the defendants be held in contempt, the plaintiffs argued that the defendants were denying adequate access to the courts for prisoners assigned to custody levels I, IV, and V at Scott. The defendants responded that any limits on library and legal-assistant use were "justified by legitimate security concerns." *Id.* at 1364. The district court rejected the defendants' arguments, and concluded that the defendants "denied, in violation of the orders of this Court and the Constitution, level I, IV, and V prisoners at [Scott] meaningful and effective access to the courts." *Id.* at 1367. The court noted that the defendants did "not deny that their denial of level I and level V prisoners access to [the main] law library is contrary to the remedial plan," but instead "argu[e] that they had a legitimate penological interest for their actions and that they have provided adequate alternative means of access." *Id.* This, the court held, was insufficient to cure their contempt, because it was not within the defendants' province to unilaterally alter a provision of the remedial plan. The court also rejected the stated security concerns of the defendants, opining first that the security concerns alone did not render it impossible to provide meaningful access to the courts, and second, that while "[p]rison security is unquestionably a legitimate penological interest," the defendants' "refusal to allow level I and V prisoners access to the main law library does not bear a

rational connection to prison security," in the absence of evidence that Level I prisoners have proven historically to be a security threat. See *id.* at 1370.

b.
Vocational Programming

The district court next turned to the defendants' actions with respect to vocational programming. The court observed that its prior orders required the defendants to provide six vocational programs at Scott. The plaintiffs' position in their contempt motion was that the defendants "ha[d] unilaterally discontinued court ordered vocational programming," and that they "den[ied] programming to prisoners at [Scott] on the basis of custody level." *Id.* at 1372.

The district court found that the defendants had discontinued three vocational programs auto mechanics, building trades, and institutional maintenance; that Level I inmates had systematically been denied vocational programming; and that particular Level IV and V inmates had in the past been denied vocational programming, but that the defendants' "prerequisites for prisoner participation in vocational programming do not presently discriminate based upon custody level." The court then concluded that the defendants were "in contempt of [the district court's] orders requiring six vocational programs" at Scott because they were only providing four programs, and further that the defendants had "denied court ordered programming to level I, IV and V prisoners based upon their custody level." *Id.* at 1373, 1376. With regard to the latter conclusion, the court noted that the defendants themselves admitted denying programming based on custody level, but argued that this was justified because of security concerns. The district court rejected this argument, again stating that the segregation policy "does not mandate denial of programming," and also noting that the policy itself includes an exemption for vocational programming. *Id.* at 1376. The court concluded, however, that the defendants had purged themselves of contempt in this particular regard by no longer denying programming based on custody level.

c.
Camp Branch

The court next turned to allegations regarding Camp Branch. There, the plaintiffs' allegations related to the defendants' failure to provide "off-grounds programming" that is, public works and work-pass programs to camp inmates, and to the defendants' alleged denial of access to "educational, vocational, and apprenticeship programming." The court asserted that its "1979 order and . . . 1981 orders required Defendants to provide work pass and public works programming at all prisons and camps housing members of the plaintiff class." *Id.* (emphasis added). It further noted that while the defendants are not required to provide vocational, apprenticeship, or college programming at camp facilities, it has nonetheless "been the long-standing commitment of Defendants that qualified prisoners who are placed in the camps may transfer to a facility providing court ordered educational, vocational, and apprenticeship programming not available in the camp." *Id.* (emphasis added).

The district court found that the defendants were "in contempt of several . . . orders concerning camp facilities," as follows: (1) by not providing a work-pass and public-works program until after the plaintiffs filed a motion to compel; (2) by not permitting the transfer of "eligible prisoners at Camp Branch who request vocational, apprenticeship, or prison industry programming to a facility which provides these programs"; and (3) by transferring new inmates directly to camps without allowing them to enroll in programming or testing them for eligibility. *Id.* at 1378.

d.
Apprenticeship Programs

Finally, the district court addressed apprenticeship programs. The court stated that the remedial plan obligated the defendants to provide five "meaningful" apprenticeships at Crane, as well as to actively "recruit prisoners for the apprenticeships." *Id.* at 1379. The court also relied on a 1993 order for the proposition that "[t]he mere posting of apprenticeship openings was . . . insufficient," and the defendants were instead "specifically required to assist in

motivating inmates to apply for apprenticeships." *Id.*

The district court concluded that the defendants were in contempt of the remedial plan for failing to provide "the quantity [and] the quality of apprenticeships that [the district court] ha[d] ordered." *Id.* at 1382. With regard to quantity, the defendants had never filled one apprenticeship, electrician maintenance, and two others, landscape gardener and building maintenance, were filled "[i]n a manifest scramble," only after the plaintiffs filed a contempt motion. Further, it specified, "not one inmate has completed an apprenticeship at Crane since they were first ordered." *Id.* (emphasis omitted). With regard to quality, the court concluded, the amount of on-the-job training was insufficient and the teaching was "uneven." *Id.* at 1383.

2.
Sanctions

The district court then turned to the question of appropriate sanctions, and concluded that there was "no alternative to stimulate compliance but to impose significant monetary contempt sanctions." *Id.* at 1384. It therefore imposed a $500-per-day fine for contempt in connection with each of (1) access to the courts; (2) vocational programming; and (3) apprenticeship programs, for a total of $1500 per day, until the attainment of compliance. These fines were set to increase in approximately two-and-a-half months, to $5000 per day for each violation, for a total of $15,000 per day.

The defendants filed another appeal, and, following the defendants' contemporaneous motion, we stayed the district court's order.

III.
ANALYSIS

With that background, and before taking up the third matter on appeal attorney fees we turn now to our discussion of the termination of federal-court supervision and contempt issues.

A.
Motion to Terminate

In its initial 1979 decision, the district court appears to have recognized the extraordinary and sensitive nature of its undertaking:

> The possibility of judicial intervention in matters of State concern must be approached cautiously. Given the typical complexity of the problems in operating a prison system, a policy of deference to the decisions of responsible State officials is required.

Glover, 478 F. Supp. at 1079. And the court correctly identified the remedial goal to be achieved in this litigation parity in the treatment of male and female prisoners:

> The term "parity of treatment" describes concisely the standard to which . . . the State ought to be held in its treatment of female prisoners. In other words, Defendants here are bound to provide women inmates with treatment and facilities that are substantially equivalent to those provided the men[,] i.e., equivalent in substance if not in form unless their actions . . . bear a fair and substantial relationship to achievement of the State's correctional objectives.

Id. (emphasis added).

We conclude that in the course of its supervision of this litigation, the district court has lost sight of the standard it correctly identified in 1979 and, perforce, has lost sight of its goals. To reiterate, those goals are (1) remedying constitutional infirmities through achieving parity of treatment for men and women and ensuring access to the courts for women, and, as soon as that is accomplished, (2) terminating federal judicial involvement.

As an initial matter, we note that to approach the issues before us in any straightforward manner is difficult, because

the case comes to us as a morass of procedural irregularity and the parties' obfuscation of the issues. The defendants' characterization of their motion below as a request for Fed. R. Civ. P. 60(b) relief, and their evasiveness as to what, precisely, is the underlying judgment the district court was being asked to review is only the beginning of the procedural imprecision that has burdened the district court's action as well as our own. One complication we face is that it is unclear whether the remedies for the unconstitutional conditions of confinement the district court found have been set forth in (1) a consent decree or in (2) a court-imposed judgment following full litigation. This inquiry is critical; whether it is one or the other determines the appropriate standard for termination of federal-court oversight, and the standards are not the same. *Compare Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) with *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992). If the defendants' Rule 60(b) motion was addressed to the 1981 Final Order, we are faced with the parties' dispute as to whether the Final Order is a consent decree. But if the defendants' motion is instead addressed to the remedial plans, a position that both parties adopt and abandon at various instances in their briefs, we are faced with still another problem: the plans were never approved by the district court, and thus were not "final judgment[s] [or] order[s]" under Rule 60(b). We are left to consider, then, the effect of the district court's *ipse dixit* that the remedial plans were "de facto" approved at the time it denied the Rule 60(b) motion.

Although the parties have failed to definitively articulate which of the several "documents" considered by the district court is the appropriate subject of our analysis, we find it possible to bypass that inquiry. We conclude that in no event is any of the underlying documents a "consent decree" that could hold the defendants to a higher compliance standard than what is otherwise constitutionally mandated. First, considering the 1981 Final Order, we see nothing in the record to suggest it is a consent decree. The district court has never labeled it as such and the parties are unable to agree that it is. And we note that while there may have been negotiations among the district court and the parties about the precise terms of the 1981 Order, that alone does not transform it into a consent decree. Instead, all indications are that it was imposed on the defendants after their fully litigated defeat.

Considering next the remedial plans, we conclude that these cannot be consent decrees for two reasons: (1) as the plaintiffs themselves stated, they were objected to by the plaintiffs, and (2) they were never adopted by the district court as its own order prior to its decision declining to amend them.

We proceed, then, from the premise that the defendants' actions are not constrained by a consent decree, but rather, by an order of the district court to which the defendants have never consented. That being so, our standard of review of the district court's denial of the defendants' motion to terminate judicial oversight is whether the constitutional violations the district court found in 1979, denial of "parity of treatment . . . of female prisoners" and denial of constitutionally mandated access to the courts, continue to exist today. The district court and the parties have failed to attend to this question; in fact, it is not directly the question that the defendants have put to us in this appeal. It is, however, the question we must necessarily answer in order, in turn, to answer the question the defendants have asked: whether the district court's supervision of this suit should be terminated. Unfortunately, the attention of all concerned the district court, the parties, and this court as well has been consistently misdirected to an inquiry into whether the state has complied with the details every jot and title of the requirements of the remedial plans and the district court's multitudinous orders.

To some degree, this misdirection is understandable. It was necessary for the district court, once it found constitutional violations, to develop a specific methodology by which constitutional compliance could be attained and maintained. The intermediate steps it has devised to achieve the compliance, however, have become the focus of everyone's attention; the ultimate goal toward which those compliance measures have been directed appears to have been largely ignored. "Getting there" has obscured where "there" is.

The lengthy pendency of this case has resulted in monumental changes in circumstances. Not only have most of the named parties departed the scene, but there have been altered educational opportunities for all inmates, changes in custodial philosophies and facilities, and shifting and evolving

educational and occupational interests. The court system, necessarily a slow-moving and even ponderous institution, is ill-equipped to adapt itself to this lack of stasis. In its understandable frustration with the problems surrounding compliance with the extensive details of its many orders and plans, the district court has imposed still more obligations on the defendants, and compliance has become a moving target.

Properly conceived, the district court's mission need not be so elusive. Its duty is not to develop a minutely detailed program for the women's prisons and to enforce every facet of its terms. It is a truism that "[j]udicial oversight over state institutions must, at some point, draw to a close." *Johnson v. Heffron*, 88 F.3d 404, 407 (6th Cir. 1996). The challenge, it appears, is to remember that terminating judicial oversight is an objective to be affirmatively strived for, not simply an event that we welcome if it happens to occur. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 88-89 (1995).

To restate the matter for purposes of emphasis, the federal court's authority the district court's and this court's to intrude itself into the operation of Michigan's prison system is limited to assuring (1) that sufficient parity is achieved between male and female inmates in matters of educational and vocational opportunities as satisfies the demands of the Equal Protection Clause of the Fourteenth Amendment, and (2) that female inmates have the level of access to the courts that is constitutionally required under the First Amendment. See *Lewis v. Casey*, 116 S. Ct. 2174 (1996). Consideration of whether these ultimate goals have been accomplished has been notably absent from the district court's pronouncements and the parties' advocacy. But without a definitive finding by the district court as to these matters, we are simply unable to assess whether, as the defendants assert, it is now proper to terminate federal-court intervention. *Cf. Rufo*, 502 U.S. at 389.

All involved in this litigation must bear in mind that the details of the district court's remedial plans and orders are not ends in themselves; they are only a means to an end. If the defendants can demonstrate that they have remedied the constitutional violations found in 1979, even without compliance with the details of previous orders or plans, they must be permitted to do so. And if they do so, federal-court

oversight must terminate. But that is not to say that if the State has culpably failed to comply with particular district court orders, it should not be held accountable through contempt proceedings. Validly entered court orders, even if later shown to be unnecessary, must be obeyed, under pain of contempt.

We wish to cut the Gordian knot presented by this aging litigation, but to do so, we must be presented with sufficiently detailed findings of fact and conclusions of law addressing whether the defendants have achieved the parity of educational and vocational opportunity and the requisite access to court that the district court found lacking in 1979. Therefore, we must remand to the district court for further proceedings, and shall mandate the following.

Within 120 days following issuance of this opinion, the district court shall conduct hearings and receive evidence, including stipulations by the parties, in order to determine with particularity the educational, vocational, apprenticeship, and work-pass opportunities presently being provided (1) to male inmates and (2) to female inmates in the Michigan correctional system. The district court will then make particularized findings of fact and conclusions of law determining whether the male and female inmates are presently being provided sufficiently comparable education, vocational, apprenticeship, and work-pass opportunities as to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment. In undertaking this task, the district court must take into account the present conditions of custody and population size at various institutions; any differences in educational and vocational interests between male and female inmates; available educational and vocational training resources; and such other considerations as the district court may deem appropriate. To the extent that, on the basis of such findings of fact and conclusions of law, the district court finds compliance with the Equal Protection Clause of the Fourteenth Amendment, it will terminate its exercise of jurisdiction over the defendants as to those matters. Should the court determine, however, that the requirements of the Equal Protection Clause of the Fourteenth Amendment are not being met as to any of the foregoing, it will explain its reasons for such conclusion and it will identify with particularity the

measures it deems necessary to assure equal protection for female inmates.

Next, the district court must also, within the same period of time, conduct hearings and receive evidence, including stipulations by the parties, to determine with particularity whether female inmates are presently being denied access to court as guaranteed by the First Amendment, as that entitlement is authoritatively interpreted by the Supreme Court in *Lewis v. Casey*, 116 S. Ct. 2174. Should the court determine that the requirements of the First Amendment are not being met, it will explain its reasons for such conclusion, and it will identify the particulars in which female inmates are being denied the access to court that is required by the Constitution, and likewise identify with particularity the measures it deems necessary to assure that such access is given.

The district court's findings of fact and conclusions of law will be reduced to writing and filed with this court not later than 150 days following the date of issuance of this opinion.

We retain jurisdiction as to this aspect of the case.

B.
Contempt Proceedings

We turn now to the second of the matters appealed, the contempt sanctions imposed by the district court, which we review for an abuse of discretion. See *Glover*, 934 F.2d at 710.

> In a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order.
>
> A litigant may be held in contempt if his adversary shows by clear and convincing evidence that "he violate[d] a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of

> the court's order."

Id. at 707 (citation omitted). It is the petitioner's burden here, the plaintiffs' to make a *prima facie* showing of a violation, and it is then the responding party's burden to prove an inability to comply. See *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995). This court has explained:

> [T]he test is not whether defendants made a good faith effort at compliance but whether "the defendants took all reasonable steps within their power to comply with the court's order."
>
> [G]ood faith is not a defense to civil contempt. Conversely, impossibility would be a defense to contempt, but the Department had the burden of proving impossibility, and that burden is difficult to meet. Although diligence is relevant to the question of ability to comply, the Department's evidence of diligence alone does not satisfy that burden.
>
> "[I]nability to comply would be a defense . . . but defendants would be expected . . . to show this 'categorically and in detail.'"

Glover, 934 F.2d at 708 (citations omitted).

1.
a.
Access to Court

The district court's finding of contempt and imposition of sanctions with respect to the defendants' failure to meet the district court's requirements for assuring the plaintiffs' access to the courts must be reversed. The court's findings were based entirely on the defendants' failure to comply with the terms of the remedial plans. The existence of a "definite and specific order" that has been disobeyed is a prerequisite to the imposition of contempt sanctions, *Glover*, 934 F.2d at 707, and the remedial plans simply do not satisfy that requirement. Even if it may be assumed, *arguendo*, that the district court

effectively adopted the remedial plans at the time it denied the defendants' motion to terminate, it did not, and could not, do so *nunc pro tunc*. Thus, at the time of the defendants' alleged "violations" of the remedial plans, the remedial plans were not orders of the court. Therefore, the defendants were not in contempt by failing to adhere to their terms.

b.
Vocational Programming

According to the district court there was only one basis for imposing sanctions with respect to its findings that defendants failed to provide adequate vocational programming: reduction in programs from the required six to four. The defendants argue that the district court had been ambiguous about how many vocational programs it would require. We do not agree. The district court was repeatedly explicit that it required six separate vocational programs for female inmates. The record is equally clear that the defendants offered only four programs. See *Glover*, 931 F. Supp. at 1373. Therefore, this aspect of the district court's contempt judgment is affirmed.

c.
Camp Branch

The district court found the defendants in contempt and imposed sanctions in part due to the defendants' failure to comply with the requirements of the court's 1979 order concerning off- grounds programming at the women's prison camp. The district court was mistaken; in 1979 Michigan did not have any prison camps for women. See *Glover*, 478 F. Supp. at 1093-94. In 1981, however, the district court did order that "educational programs shall be available to women inmates at [camps] on the same basis as available at camps housing male inmates." *Glover*, 510 F. Supp. at 1024 (emphasis added). However, it never mentioned off-grounds programming for Camp Branch. The defendants are not, therefore, in contempt for failing to provide a work-pass or a public-works program.

The district court also faulted the defendants for not permitting transfers upon request of Camp Branch prisoners to

facilities that provide vocational, apprenticeship, or other similar programming. This is not a proper basis for a contempt sanction, however, because by the district court's own reasoning, the defendants were not required to do so by court order; it had simply been their "long-standing commitment." *Glover*, 931 F. Supp. at 1376. Likewise, the defendants are not subject to sanctions for putting new inmates directly into camps without allowing them to enroll in programming, as this too was never a court-ordered requirement.

d.
Apprenticeships

We turn, finally, to the district court's contempt sanctions with regard to apprenticeship programming. A large part of the district court's reasoning depended on its findings that the defendants had violated the remedial plans and this, as we have already explained, is not a proper foundation for contempt sanctions.

The district court also asserted, however, that an order it issued in 1993 required the defendants to actively recruit inmates for apprenticeships, rather than simply to post availability notices, and on this basis, it also found the defendants in contempt. We must disagree. The order in question reads in pertinent part as follows:

> Although plaintiffs may not specifically raise this issue, I shall take this opportunity to express my displeasure with defendants' procedures of communicating information about apprenticeship openings to the inmates . . . . Simply posting a notice on a bulletin board for two weeks advertising the opening of an apprenticeship, or engaging in very informal and verbal notification of such openings, is insufficient. Defendants must somehow attempt to motivate the inmates to apply for an apprenticeship opening. . . . While I am not ordering defendants to create yet another comprehensive plan . . . , I am strongly urging the Department of Corrections to show more

> willingness to adhere to its purpose as reflected in its name: correct the problem. The problem, perhaps, is the inmates' lack of motivation to apply for such apprenticeships because, in part, they are unaware of the benefits gleaned from a meaningful apprenticeship. Merely posting a flyer announcing an opening in an apprenticeship program to inmates unaware of its positive aspects is an insufficient attempt to correct the problem.

(Emphasis added.) We find several elements of this order disturbing. In the first place, noncompliance with the terms of this order is not a proper basis for a finding of contempt and the imposition of sanctions because, as the ruling itself states, it does not "order" the defendants to do anything. The defendants cannot be held in contempt and fined for failure to heed what the district court "strongly urg[ed]"; a party may be found in contempt for disobedience of a court's lawful order, but not for disregarding its "urging."

More fundamentally, however, we view this order as an example of the loss of focus in these proceedings. It is beyond peradventure that constitutional equal protection mandates do not require the defendants to "motivate" inmates into expressing interest in apprenticeship programs. The district court is not, and is not expected to be, an expert in matters of the inmates' interests. The appeal of an apprenticeship to inmates, and the psychosocial reasons why inmates may not be prepared to take advantage of certain programs, are matters to be left to the exclusive domain of the State, not the federal courts. In engaging in this type of judicial micro-management, the district court far exceeded its authority.

2.

Because we affirm only one small part of the district court's contempt order, it is necessary to remand to allow the district court to redetermine appropriate sanctions.

IV.
ATTORNEY FEES

We turn, finally, to the third of the consolidated appeals: the district court's award of attorney fees to the plaintiffs. This appeal presents two issues for our consideration: whether the district court (1) erred in concluding that the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996), does not apply to limit the fees incurred by the plaintiffs between July and December 1995, or (2) abused its discretion in awarding attorney fees to the plaintiffs for certain categories of work. We conclude that the district court correctly resolved the issue regarding the applicability of the PLRA. We also conclude that the court did not abuse its discretion with respect to most of the attorney fees it ordered. However, we will vacate that part of the court's order awarding fees for advocacy by the plaintiffs' attorneys on behalf of inmates who were allegedly retaliated against by the defendants as a result of their participation in this lawsuit, because, with respect to that award, the district court abused its discretion.

A.

In 1985, the district court entered the following order with respect to attorney fees:

> IT IS HEREBY ORDERED that Plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months. Defendants will have twenty-eight days in which to contest the amount of the fee request.

The defendants stipulated to entry of this order.

The district court subsequently interpreted this order as meaning the plaintiffs were entitled to attorney fees for post-judgment matters, irrespective of whether they actually prevailed on a particular issue:

> I will not now revisit the decision to award plaintiffs post-judgment attorney fees. The

> parties stipulated to the entry of this order four years ago, and since then have abided by their agreement. While 42 U.S.C. § 1988 does provide that prevailing parties in civil rights suits may receive attorney fees, defendants should have voiced this objection in 1985. Neither this statute nor my order requires me to redecide the prevailing party issue every six months throughout this prolonged litigation. Rather, the order states plaintiffs are entitled to attorney fees.

And in 1987, the court ruled, in response to a number of objections by the defendants regarding attorney fees, that its 1985 order entitled the plaintiffs to attorney fees for any activity related to "monitoring" the defendants' compliance: "Plaintiffs' counsel are charged with responsibility for monitoring compliance with this Court's judgment requiring parity of programming between male and female inmates in the custody of the Michigan Department of Corrections."

On February 1, 1996, the attorneys for the plaintiffs sent a letter to defense counsel communicating their fees and costs for the six-month period between July 1 and December 31, 1995. Attorney Michael Barnhart submitted billing records totaling 122.90 hours, and attorney Deborah LaBelle submitted billing records totaling 497.15 hours. On February 27, the defendants responded, objecting generally to a number of charges, but without any elaboration. The objections that are at issue in this appeal are objections to work relating to several appeals to this court filed by the defendants; fees for conferences between Barnhart and LaBelle that the defendants assert amount to "double billing"; and "any fees in non-*Glover* related issues."

On March 11, 1996, the plaintiffs filed their petition for attorney fees incurred between July 1 and December 31, 1995. With respect to the so-called double-billing issue, the plaintiffs' petition specifies:

> Defendants' objections list dates of alleged consultation between counsel. Two of the listed dates for Ms. LaBelle do not concern any

> communication, discussion or meeting with Michael Barnhart. (11/12/95, 11/15/95). The remaining dates total 13.70 hours for a six-month time period in which counsel spent conferring, discussing and dividing issues in this case.

The defendants' response did not dispute or otherwise even address these assertions. Indeed, their district-court brief with regard to this issue simply stated:

> Counsel for Plaintiffs, on numerous occasions, have repeatedly told the Court that there has been a definitive assignment of duties and no duplication should take place. Defendants once again object to the repeated duplication of attorneys [sic] fees set forth by Plaintiffs' counsel. Such objections are not waived nor barred by Plaintiffs' reliance on this Court's [prior decisions], which dealt specifically with the factual issues presented to the Court solely at that time. Despite Plaintiffs' counsels' protestations to the contrary, the prior rulings on separate attorney fees issues are not controlling.

The defendants' only other support for their claim that plaintiffs' counsel were "double billing" was the attachment of their February 27 letter.

On April 26, 1996, the Prison Litigation Reform Act of 1995 was signed into law. Certain provisions of the PLRA relate to attorney fees in prison litigation. On May 7, 1996, the defendants filed a supplemental brief, inviting the court's attention to the existence of the PLRA, and arguing that its attorney-fee provisions should have retroactive effect with respect to the plaintiffs' then-pending petition for attorney fees.

On May 9, 1996, the district court held a hearing on the plaintiffs' petition, and on May 31, 1996, it entered an opinion and order. Rejecting the defendants' argument that the PLRA applied to the plaintiffs' attorney-fee request, the court then

addressed the defendants' specific objections to particular fees. It first rejected the defendants' objections to fees for time spent by plaintiffs' counsel in consultation with each other:

> [Defendants] object to time spent by Deborah LaBelle and Michael Barnhart, counsel to the plaintiff class, in consulting, conferring, or discussing matters between themselves. The hours objected to are thirteen in a period of six months between July 1, 1995[,] through December 31, 1995. Again, as I have in the past, I find that these hours[,] "given the magnitude and the complexity of this case, . . . [are] at least reasonable and probably necessary."

(Citations omitted.)

Next, the court rejected the defendants' argument that they should not be responsible for fees in connection with an aborted appeal of various orders:

> Defendants object to the payment of fees incurred in the . . . Sixth Circuit . . . . These [three] appeals all stemmed from this court's orders establishing a Compliance Committee in order to achieve finality in this case. It was this court's purpose, because of the excessive litigiousness that surrounded compliance with this court's orders, that a new approach be taken. That approach was to "take the lawyers out of the case" and have the Wardens of the two women's prisons, the Special Administrator, the Court Monitor and a representative of the plaintiff class meet and resolve these complex issues. The procedure adopted by this court began to founder . . . and, thus, it was necessary to disband this approach. When the court vacated its orders establishing the Compliance Committee, plaintiff[s'] counsel filed a motion to dismiss these appeals that the court's order had generated. Initially the defendants opposed the dismissal but then, on stipulation, agreed to voluntarily dismiss the appeals. This was done only after the submission of briefs in the Sixth Circuit.
>
> Even though defendants objected to the court's orders for a Compliance Committee . . . and appealed these orders, which they subsequently voluntarily dismissed, they argue that the plaintiff class is not the prevailing party and, therefore, the fees cannot be ordered paid.
>
> The argument is rejected, and the defendants are ordered to pay all fees in Appeal Case Nos. 95-1903, 95-2037 and 95-2120.

Finally, the district court rejected the defendants' objections as to payment for "non-*Glover*" issues:

> Defendants object to the payment of 11.15 hours, which they argue concerns issues not related to the *Glover* case. It appears that defendants are engaged in hair-splitting. One so-called non-*Glover* issue arose out of a claim of retaliation by an inmate, a member of the class who claimed that her jewelry had been confiscated as contraband after she participated in this case; and another inmate similarly situated was apparently removed from her prison detail. Plaintiffs' class counsel pursued these matters with defendants' counsel, and I am informed that both these actions were reversed. Another claimed issue on retaliation involved complaints with regard to excessive heat at Camp Branch. The complainants were two women inmates who received "misconducts" for complaining; and, when plaintiffs' class counsel brought this issue to defendants' counsel, the two women inmates did receive rehearings and their "good time" credits were restored. A third so-called non-

> *Glover* issue involved plaintiffs' class counsel Michael Barnhart's appearance at legislative hearings. Barnhart appeared at the legislative hearings because matters regarding the *Glover* case were discussed by the Director of the Department of Corrections. It appears to me that Barnhart properly acted in monitoring these matters inasmuch as they relate directly to this case.
>
> Thus, the objection of defendants to the payment of 11.15 hours to plaintiffs' class counsel is overruled.

The defendants filed a timely appeal of this order. They also filed a motion for approval of a bond staying payment of the attorney fees. While the plaintiffs agreed to a bond for part of the attorney fees, they took the position that the defendants should have to pay the undisputed amount, covering 228.40 hours. The district court agreed with the plaintiffs' position, and entered one order on July 12 allowing the defendants to post a bond for part of the amount they owed $74,935.40 but simultaneously entered another order directing payment by July 19 of $33,127.51, for what it termed "undisputed fees and costs."

The defendants did not pay this amount, but before they filed a notice of appeal, the district court four days after the July 19 deadline issued an order to show cause why the person responsible for compliance should not be held in contempt, and set a hearing for August 2. The district court also set a show-cause hearing for the same date with respect to the defendants' failure to file the stay bond that had been approved.

The defendants then filed a motion for a stay of all the orders at issue: the original attorney-fee order, the bond order, the order directing payment of some attorney fees, and the two show-cause orders. This court granted the motion on July 30, 1996. After entry of the stay, the defendants filed a notice of appeal of the orders from which they had not yet appealed. These appeals were then consolidated by this court.

B.

1.

As a general matter, attorneys for plaintiffs pursuing actions under 42 U.S.C. § 1983 are entitled to attorney-fee awards pursuant to the guidelines of 42 U.S.C. § 1988:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b). This statute, however, must now be read in conjunction with the PLRA, which took effect on April 26, 1996, at the time it was signed into law. See *Wright v. Morris*, 111 F.3d 414, 417 (6th Cir.), *cert. denied*, 118 S. Ct. 263 (1997). Section 803(d) of the PLRA provides the following with respect to attorney fees in prisoner suits:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

42 U.S.C. § 1997e(d) (emphasis added).

The defendants have argued that the underscored portions of the PLRA affect this case. They claim, first, that the plaintiffs did not "establish[] how each hour they charged was directly and reasonably incurred in proving an actual violation of constitutionally protected rights," see 42 U.S.C. § 1997e(d)(1)(A) & (B)(ii), and second, that the plaintiffs should be limited to an hourly rate of $112.50 pursuant to section 1997e(d)(3). This challenge raises a purely legal question of the retroactivity of the PLRA, that is, a question of statutory interpretation. Our review is, accordingly, de novo. See *United States v. TRW, Inc.*, 4 F.3d 417, 421 (6th Cir. 1993); see also *Borregard v. National Transp. Safety Bd.*, 46 F.3d 944, 945 (9th Cir. 1995); *cf. Freeman v. Laventhol & Horwath*, 34 F.3d 333, 342 (6th Cir. 1994).

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court established the analytical approach we

must follow. *Landgraf* instructs that we first determine whether Congress "expressly prescribed the statute's proper reach." *Id.* at 280. Absent an express command that a statute operates retroactively, a "traditional presumption" against retroactivity comes into play so that the statute will not be applied. *Id.*; see *Wright*, 111 F.3d at 418; *Jensen v. Clarke*, 94 F.3d 1191, 1202 (8th Cir. 1996).

Adequate authorization for a truly retroactive effect exists only where there is "statutory language that [is] so clear that it c[an] sustain only one interpretation." *Lindh v. Murphy*, 117 S. Ct. 2059, 2064 n.4 (1997). As an initial matter, then, we find it plain that this type of clear statutory directive is absent from the PLRA's attorney-fee provision. See *Jensen*, 94 F.3d at 1192. But see *Alexander S. v. Boyd*, 113 F.3d 1373, 1385-86 (4th Cir. 1997). Section 803(d) simply provides that in any action brought by a prisoner in which attorney fees are authorized under 42 U.S.C. § 1988, such fees "shall not be awarded," except as provided therein. Given the high stakes of the retroactivity question, it would be surprising for Congress to express such an intent by merely stating when attorney fees "shall not be awarded"; we would instead expect some explicit reference that the statute was to apply in the generally disfavored retroactive way.

We therefore turn to whether application of section 803(d) to an award of attorney fees for legal assistance completed prior to enactment of the PLRA results in an impermissible retroactive effect. Retroactive effect means more than that the statute is applied to pre-enactment conduct, or that it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (footnote omitted). Rather, we must inquire whether the new statute "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" *Id.* (citation omitted). In other words, we must ultimately ascertain "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 270.

Although "'the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took

place,'" *id.* at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)), in certain circumstances a court will instead "apply the law in effect at the time it renders its decision," *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974). The defendants argue that the latter principle should apply here, and that the presumption against retroactivity is no bar to the determination of attorney fees because such determinations are collateral to the underlying cause of action. We disagree.

Bradley presented almost the converse of the situation here. There, the district court had awarded attorney fees to parents who had prevailed in a school desegregation case, relying on general equitable principles to do so. While the appeal from that decision was pending, Congress passed a statute allowing for an award of attorney fees in school desegregation cases. The Supreme Court held that this statute applied to the pending case, reasoning that to do so did not "result in manifest injustice." *Id.*

The reasoning and result in *Bradley*, however, do not dictate that the PLRA be applied here, given the key distinction between the cases. There was no manifest injustice in applying the new fee statute in *Bradley*, given that fees had already been awarded under an alternative theory; the legal theory for an award may have changed, but the fact of the award did not itself present any surprise to the defendants. Here, in contrast, application of the attorney-fee provisions to a fee motion that was pending at the time of the PLRA's passage and that pertained solely to work performed before the statute's passage would undeniably work an impermissible retroactive effect. Throughout 1995, the inmates' attorneys presumably expected that, as the court had ordered, they would be reimbursed for their monitoring work under 42 U.S.C. § 1988 at the then-established rate. Application of the PLRA in determining the attorney fees would frustrate those expectations. Further, the parameters of the attorney-fee statute in effect at the time legal services are requested clearly affects the relationship between the prisoners and their attorneys, including whether an attorney chooses to provide legal assistance in the first place. But see *Alexander*, 113 F.3d at 1387 n.12.

Indeed, application of the PLRA's attorney-fee provisions where the prisoners' attorneys have reasonably conformed their conduct in reliance on the older provisions of 42 U.S.C. § 1988 would confound the very policy underlying the presumption against retroactivity: "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 265-66. Accordingly, we hold that allowing the PLRA's limitations on attorney fees to alter the standards and rate for awarding fees for legal work completed prior to passage of the PLRA results in an impermissible retroactive effect by attaching significant new legal burdens to the completed work, and by impairing rights acquired under preexisting law. See *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996). A contrary conclusion would be repugnant to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270.

As an aside, we note that in dicta, the Court in *Landgraf* stated that attorney-fee determinations are "'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" *Id.* at 277 (quoting *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451-52 (1982)). The labeling of attorney fees as "collateral," however, does not suggest that the presumption against retroactivity should not apply to new attorney-fee provisions. In classifying attorney-fee determinations as "collateral," the Court linked them to their sister class of cases those involving new procedural rules. See *id.* at 275-77. Generally, courts may apply new procedural rules to cases arising before their enactment without triggering concerns about retroactivity because "rules of procedure regulate secondary rather than primary conduct." *Id.* at 275. The Court nevertheless recognized that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.* at 275 n.29 (emphasis added). Rather, "the applicability of such provisions ordinarily depends on the posture of the particular case." *Id.* In other words, laws regulating litigation conduct often impact the substantive rights of the parties as well. *Cf. Hughes Aircraft Co. v. United States*, 117 S. Ct. 1871, 1878 (1997). Similarly, a law governing attorney-fee provisions may also affect the substantive rights of the parties and in this

instance, as we have explained, it does.

We note, finally, that our holding does not address the effect of the PLRA's fee-limitation provisions on attorney fees for post-PLRA-enactment work rendered in a case that was pending at the time of enactment. See *Landgraf*, 511 U.S. at 289 (Scalia, J., concurring). The issue whether fees earned by the plaintiffs' attorneys after April 26, 1996, will be limited by the PLRA is not before us in this appeal, and we have no occasion to address it.

2.

The defendants' second argument takes issue with particular aspects of the plaintiffs' attorney fees. "A district court's award or denial of attorney's fees is reviewed for abuse of discretion." *Cramblit v. Fikse*, 33 F.3d 633, 634 (6th Cir. 1994) (per curiam). "This deference[] 'is appropriate in view of the district court's superior understanding of the litigation[.]'" *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 909 (6th Cir. 1991) (citation omitted).

a.

The defendants argue that the plaintiffs are not entitled to attorney fees for work done in connection with proceedings collateral to the main action when the plaintiffs did not prevail in those collateral proceedings. Specifically, the district court awarded certain relief in 1995, from which orders the defendants appealed. While the appeals were pending, the district court vacated the orders. Although the defendants initially appealed the order vacating the prior orders, they later filed a stipulation of voluntary dismissal of their appeals. The defendants now argue that the plaintiffs were not the prevailing parties with regard to those appeals, and that the defendants should not, accordingly, be liable for any attorney fees and costs.

We have already rejected a virtually identical argument in a previous *Glover* appeal. There, the defendants had argued that the plaintiffs were not entitled to attorney fees for their work on various contempt motions because they could not be "prevailing parties" with respect to those motions until and

unless this court heard the appeal and ruled in the plaintiffs' favor. We said then:

> Defendants claim the district court erred in awarding attorneys' fees without determining whether plaintiffs were prevailing parties. They contend that plaintiffs are not prevailing parties under 42 U.S.C. § 1988 until this court reviews the district court's finding of contempt because compliance with the court's 1979 and 1981 orders is the sole issue, and plaintiffs cannot establish the degree of success required to be a prevailing party entitled to a fee award until this court decides the contempt issue.
>
> . . . .
>
> The district court has the discretion to award the prevailing party in a civil rights action reasonable attorneys' fees. We reject the argument that the filing of a contempt motion to compel compliance with the court's previous orders is something other than monitoring, which is a compensable activity under section 1988. . . .
>
> In bringing the contempt motion, plaintiffs were seeking defendants' compliance with the district court's 1979 and 1981 orders in which plaintiffs were prevailing parties. The district court did not abuse its discretion in finding plaintiffs were entitled to attorneys' fees.

Glover, 934 F.2d at 715-16 (citations omitted).

The defendants rely heavily on our decision in *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), claiming that *Northcross* held that fees may not be awarded for work on collateral matters. The only passage in that case even remotely speaking to this issue is the following:

> The hearings here involved were collateral to and distinct from the desegregation suit

> itself, which had been finally terminated in 1974, so had the plaintiffs failed to prevail on the merits the district court would have been justified in denying fees altogether.

Id. at 641. Noting that this risk created a "real element of contingency as to whether the attorneys would be compensated for their services at all," *id.*, the Northcross court approved a 10% increase for the fees in question. Obviously, this does not support the defendants' position in the slightest. In the first place, it is dicta. In the second, it does not purport to create a rule that collateral matters cannot be compensated unless plaintiffs prevail on those matters; it simply declares that a court is "justified" in not compensating them under those circumstances.

We find the defendants' argument to be without merit. The plaintiffs should be compensated for their work in connection with the appeal of the Compliance Committee matter, both because the defendants' voluntary dismissal of the appeal in effect made the plaintiffs prevailing parties, and because that appeal clearly constituted a "monitoring" matter within the meaning of this court's earlier *Glover* opinion.

b.

The defendants next argue that the district court improperly allowed an award for 40 hours of time spent by counsel in discussing the case. They contend that the district court misunderstood their arguments in this respect, and incorrectly characterized it as an argument about 13 hours of time. They argue that discussing the case for some period of time is reasonable, but 40 hours is excessive. The plaintiffs respond that there is no evidence in the record supporting an argument that the plaintiffs' counsel spent 40 hours discussing the case, or that the defendants ever made an objection to 40 hours of discussion. The defendants' letter to the plaintiffs simply refers to a number of fee-entry dates which they contended represented duplicate billings, and does not identify a total number of hours objected to. Moreover, the plaintiffs argue, of the dates identified by the defendants as containing objectionable conferences, two do not contain any reference to consultations, and the remainder add up to 13

hours billed by each attorney for consultations.

The defendants again rely almost entirely on *Northcross*, 611 F.2d 624, suggesting that Northcross stands for the proposition that district courts should deduct for any duplicative hours. Suffice it to say that *Northcross* does not stand for this proposition. The court in *Northcross* noted that a court may exercise its discretion to "cut [hours] for duplication, padding or frivolous claims. In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services." *Id.* at 636-37. There is, obviously, an enormous difference between approving such a course of action in a particular case and establishing a rule that such a course is required. There is, moreover, nothing in Northcross that suggests that the mere fact of attorneys conferring with each other automatically constitutes duplication.

We note, too, that as with the defendants' previous argument, we have already rejected the same type of double-billing/consultation argument that the defendants raise now, finding no abuse of discretion in the district court's compensation of plaintiffs' counsel for consultation that was "'reasonably proportionate to their total hours.'" See *Glover*, 934 F.2d at 717 (citation omitted). We note further that we have consistently held a party complaining about attorney fees to a burden of stating their complaints with particularity:

> Ideally, a party should raise objections with specificity, pointing out particular items, rather than making generalized objections to the reasonableness of the bill as a whole. The defendants' failure to raise more than a generalized objection to the fees in this case would ordinarily require us to review only those items which should have been eliminated through a cursory examination of the bill. Since we are remanding the case for reconsideration of the fee award, we see no reason why the defendants should not be permitted to raise further specific objections.

Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169, 1176 n.14 (6th Cir. 1990) (citation omitted).

In sum, we reject the defendants' complaint with respect to the alleged duplication of effort. The defendants have failed to provide even minimal support for their allegations, and we are simply left with no basis for concluding that the district court abused its discretion in finding that amount of consultation reasonable, especially given that we earlier approved the district court's actions in the face of a virtually identical complaint by the defendants.

c.

The defendants' final argument is that the district court should not have allowed an award for time spent by plaintiffs' counsel on activities such as intervening on behalf of inmates who received misconduct tickets for rule violations, or complaining about whether the inmates had ice or heat at particular times. These activities, defendants contend, are completely outside the ambit of this case. While the plaintiffs claim that these incidents all constituted "retaliation" by the defendants against inmates involved in this case, and thus give rise to legitimate post-judgment monitoring, the defendants point out that there has never been a finding of retaliation against any female inmate in connection with this case.

With respect to this argument, we will reverse and remand. While it is possible that the plaintiffs' attorneys' efforts constituted legitimate monitoring, we find it disturbing that there is nothing in the record to evidence their claims that the defendants' actions were retaliatory in nature. Before the district court approves such fees, there must be an explicit finding that the fees were related to the underlying case.

V.

SUMMARY AND CONCLUSION

We intend by the rulings we make today to materially assist in bringing to a close the federal court's supervision of the Michigan women's prison system. We do so, in the last analysis, by redirecting the attention of all concerned to the

issues that divided the parties when the case was filed nearly 20 years ago. The district court has struggled mightily and with an admirable show of patience in an effort to bring about educational and vocational parity of opportunity and the level of access to the courts it thinks are required by the United States Constitution. It has not succeeded.

The parties, as between themselves, and the defendants, vis-a-vis the district court, are light-years apart in their conceptions of what the Fourteenth Amendment Equal Protection Clause requires concerning parity in educational and vocational opportunities for men and women inmates. And we are not particularly surprised. Not a single federal appellate court in the nation has ever held that a lack of parity with respect to educational or vocational opportunities between male and female inmates is a violation of the Equal Protection Clause of the Fourteenth Amendment not before this case was filed in 1979 or ever since. Indeed, the Eighth Circuit has flatly rejected the constitutional validity of such an exercise:

> [T]he programs at [the Nebraska State Penitentiary, a male prison,] and [the Nebraska Center for Women, a female prison,] reflect separate sets of decisions based on entirely different circumstances. When determining programming at an individual prison under the restrictions of a limited budget, prison officials must make hard choices. They must balance many considerations, ranging from the characteristics of the inmates at that prison to the size of the institution, to determine the optimal mix of programs and services. Program priorities thus differ from prison to prison, depending on innumerable variables that officials must take into account. In short, NSP and NCW are different institutions with different inmates each operating with limited resources to fulfill different specific needs. Thus, whether NCW lacks one program that NSP has proves almost nothing.

Indeed, as between any two prisons, there

> will always be stark differences in programming. Assuming that all prisons start with adequate yet limited funding as we must here, because the plaintiffs do not claim that NCW is subject to discriminatory funding officials will calibrate programming differently in each prison, emphasizing in one prison programs that they de-emphasize in others. Thus, female inmates can always point out certain ways in which male prisons are "better" than theirs, just as male inmates can always point out other ways in which female prisons are "better" than theirs. Comparing an isolated number of selected programs at NSP and NCW is thus a futile exercise. At bottom, using an inter-prison program comparison to analyze equal protection claims improperly assumes that the Constitution requires all prisons to have similar program priorities and to allocate resources similarly.

Klinger v. Department of Corrections, 31 F.3d 727, 732 (8th Cir. 1994) (citations and footnote omitted); accord *Women Prisoners v. District of Columbia*, 93 F.3d 910, 924-27 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997). See generally *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996).

Thus, the district court here has for many years sought to remedy a constitutional violation of dubious validity, but we do not and, indeed, may not question the district court's underlying judgment because the defendants never appealed it. Therefore, we have been left with the duty to review only the district court's many remedial orders and judgments, most of which determine whether its previous orders and judgments designed to achieve parity have been obeyed. Similarly, the district court's 1979 judgment that the female inmates have been denied constitutionally required access to court was never appealed and our subsequent appellate activity with respect to that issue has likewise been limited for the most part to reviewing the propriety of the ever-expanding detail of the district court's compliance orders.

Now it is time to return to the issue that was litigated

and adjudicated in 1979 and to determine whether, now, there exists a denial of equal protection of the law in the provision of educational and vocational opportunities for female inmates, and whether, now, female inmates are being denied the level of access to court that is required under the First Amendment. We hasten to observe that although our holding today does not call into question the district court's 1979 judgment, it does require that a judgment be made as to the conditions as they exist now not as measured by the many implementing orders and suggested remedial plans that have been in this case since 1981, but as measured by the Equal Protection Clause of the Fourteenth Amendment and the access-to- court requirements of the First Amendment as authoritatively interpreted.

As to the first of the appeals consolidated here for review, 95-1521, we hold that the district court's judgment denying the defendants' motion to terminate continuing district court jurisdiction is VACATED and the matter is REMANDED for further proceedings consistent with this opinion. We shall retain jurisdiction with respect to this appeal only.

The district court's judgment in appeal number 96-1931, finding the defendants in contempt of court and imposing sanctions, is AFFIRMED in part and REVERSED in part, and this matter is REMANDED for further proceedings.

Finally, the district court's judgment awarding attorney fees, under consideration in appeal numbers 96-1852 and 96-1948, is AFFIRMED in part and REVERSED in part, and the matter is REMANDED for further proceedings.

CONCURRING IN PART, DISSENTING IN PART

HARRY W. WELLFORD, Circuit Judge, concurring in part and dissenting in part. Judge Ryan has done a commendable job in examining and dealing with the extended and complex issues involved in this case. I write separately to address those issues of particular concern to this judge who,

like many of my colleagues, has been called upon to address a number of appeals dealing with what I characterize as micromanagement of the Michigan prisons and penal system by the experienced district judge involved in this appeal and other Michigan district judges. This case alone has generated numerous appeals, very substantial legal expense, and has occasioned a recent appeal to, and decision by, another panel on other aspects of this bundle of controversies, styled *Mary Glover, et al. v. The Director of Prisons, et al*[1] This case and *Hadix* have been litigated for more than twenty years, and the *United States v. Michigan* case for nearly fifteen years. Enormous state resources and administrative efforts have been expended to deal with these lawsuits and injunctive actions.

I. ATTORNEY FEES

A. Effect of Prison Litigation Reform Act ("PLRA," 42 U.S.C. § 1997e(d) et seq.)

Appellate cases Nos. 96-2586/2588/97-1218/1272 involved plaintiffs' fee claims and the effect of PLRA on these claims. *Hadix v. Johnson*, Nos. 96-1851/1943/1908/1907, also involved, in part, plaintiffs' attorney's fee claims. We have held that the 1997e(d) cap on fees does not apply to legal work otherwise covered performed prior to the enactment of PLRA.

I feel strongly, however, that the Fourth Circuit was correct in *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997),

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[1] Apart from numerous appeals in Glover, there have also been a number of appeals in *Hadix v. Johnson*, another Michigan prisoner class action, in which an appeal is pending, (Nos. 96-1851/1907/1908/1943). In addition, still another panel has recently decided an appeal in *United States v. State of Michigan*, No. 96-2464, dealing with a consent decree and compliance plan regarding prison conditions in Michigan. Still other prisoner retaliation claims have recently come before us on appeal based on a cursory examination of our docket: *Thaddeus X v. Blatter*, No. 95-1837 (now under en banc consideration), and *White v. McGinnis*, No. 96-2221 (6th Cir. Dec. 10, 1997). See also the recent class action Michigan prisoner visitation case, *Bazzetta v. McGinnis*, Nos. 95-2181/96-1559 (6th Cir. Sept. 4, 1997 and Jan. 5, 1998). See also *Hadix v. Johnson*, Nos. 96-2643/2582, 1998 WL 7150 (6th Cir. Jan. 13, 1998) (PLRA is constitutional).

that the Act and its cap on fees applies to work completed before enactment of the PLRA but awarded after such enactment. I find the statutory language in that respect unambiguous--fees "shall not be awarded" except as the statutes provides. "[A]pplication of an attorney fees provision to ongoing litigation is arguably not retroactive." *Landgraf v. USI Film Products*, 511 U.S. 244, 289 (1994) (Scalia, J., concurring). I would count attorney fee applications as collateral to the underlying merits and procedural in nature. See *Landgraf*, 511 U.S. at 275-77. Being procedural, a change in fee rate may be effectuated retroactively by PLRA, and certainly if the work is merely of a paralegal-type function.

The PLRA is even more clear that its fee limitation provisions apply to work rendered on a pending case after its enactment. There is, in such a situation, no reasonable argument on the part of plaintiffs' counsel that under the plain language of the limitation, after it became law, that counsel could expect to continue to be compensated at a rate higher than the statute allows. A contrary holding means that the statutory limitation is to be ignored for legal work performed after its enactment (and clear expression of congressional intent) in a pending case such as this where "the end does not appear in sight." I find nothing in the statute's legislative history that suggests it is not to apply to pending cases, at least as to legal work performed after its enactment.

I would require, moreover, that as to each substantial issue in dispute for plaintiffs to establish entitlement to what should be a statutorily limited fee, they must show that they are a prevailing party and have entitlement on that issue. Otherwise, plaintiffs are court encouraged in this case to pursue new and even expanding areas of claims against the state, such as furnishing a counsel at state expense to female prisoners (not male prisoners) in civil custody and domestic relations cases in state courts. See our recent decision *Glover*

v. Johnson, 75 F.3d 264 (6th Cir. 1996).[2]

I must therefore DISSENT on the attorney's fee issue as to construction of PLRA and its limitations.

B. Other Attorney's Fee Holdings

What has been said in section A above I would reiterate as to what I consider collateral attorney's fee claims, particularly on matters such as we addressed in *Glover v. Johnson*, 75 F.3d 264 (6th Cir. 1996). It is a time in this litigation (as well as in *Hadix)* to take seriously the congressional concerns with ever-expanding federal court involvement in prisoner litigation as reflected in the PLRA. Congress clearly intended to restrict and limit such litigation, and federal court involvement at state expense and to put a cap on attorney's fees to be awarded prisoner representatives.

I would call upon the district courts to examine very carefully so-called monitoring fees of counsel and persons designated by the courts to serve as a kind of prison overseer on ombudsmen. Potential for excessive claims and charges to the state treasury is plainly implicated. I concur in the majority decision that vacates fee awards for "advocacy by plaintiffs' attorneys on behalf of inmates who were allegedly retaliated against by the defendants."

I would also disallow one-half of the thirteen plus hours' time charge claimed by plaintiffs' attorneys in "consulting, conferring and discussing matters" together as representing duplication of effort or double charging.

II. VOCATIONAL PROGRAMMING

I would also DISSENT from the affirmance of a contempt finding for offering and maintenance of four

[2] It is interesting to note that the district court apparently ignored our decision in that case in an order dated January 31, 1997, on the purported authority of *MLB v. SLJ*, ___ U.S. ___, 117 S.Ct. 555 (1996). *MLB v. SLJ* mandates a pauper parent in a civil appeal an appellate record at state expense. It does not deal with requiring a state to furnish female prisoners counsel in civil cases having to do with domestic relations or child custody. Plaintiffs, no doubt, will be seeking attorney's fees at a rate exceeding the PLRA for such legal services expressly held not to be mandated by our court.

vocational programs instead of six ordered by the district court. There was inadequate proof, in my opinion, that defendants willfully and contumaciously acted to deprive female prisoners of reasonable vocational opportunities commensurate with the greater number of programs offered to the far greater number of male prisoners in a much higher number of male prison facilities. Taking into account geographic differences in locations, demonstrated interest, work experience, and financial burdens involved in maintaining a small program for women prisoners, I would conclude that there was no reasonable basis for a contempt finding on this issue.

I add but one more observation about what relief may be mandated in this extended controversy and the other related prison cases in Michigan. Prisoners are entitled to relief only when they show constitutional violations by prison authorities. It seems to me that "entitlements" to desirable educational, vocational, and administrative benefits have been the norm in Michigan prison cases rather than constitutional mandates. This case is not about denial of access, education, and vocational opportunity to female prisoners, but rather about the extent of such opportunities in relation to those which may have been offered to men in some Michigan male penal institutions.

I have expressed relatively narrow disagreement, except as to applicability of PLRA and fees, in the extensive majority opinion. In general, I have concurred because it covers the real issues with discernment.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20549-0001

November 16, 1998

Thomas L. Casey, Esquire
Solicitor General
P.O. Box 30212
Lansing, MI 48909

Re: 98-262 - *Perry Johnson, et al. v. Everett Hadix, et al.*

Dear Mr. Casey:

The Court today entered the following order in the above stated case:

> "The petition for a writ of certiorari is granted limited to the following questions: 1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act, the attorney fee provision of the PLRA Sec. 803(d), 42 U.S.C. Sec. 1997e(d), applies to fees awarded after the Act's effective date for services rendered after that date. 2. Whether, in such litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date."

WILLIAM K. SUTER, CLERK

Denise J. McNerney
Administrative Assistant
to Clerk

(5)

No. 98-262
In the Supreme Court of the United States
October Term, 1998

KENNETH L. McGINNIS, et al,

Petitioners,

v.

EVERETT HADIX, et al,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONERS

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40 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act, the attorney fee provision of PLRA Sec. 803(d), 42 U.S.C. § 1997e(d), applies to fees awarded after the Act's effective date for services rendered after that date.

2. Whether, in such litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date.

PARTIES TO THE PROCEEDING

McGinnis v. Hadix:

Petitioners, Kenneth L. McGinnis is Director of the MDOC; Dan Bolden is Deputy Director for the Bureau of Correctional Facilities; Denise Quarles is the Regional Administrator; Thomas G. Phillips; Bruce Curtis; Henry Grayson; and Barry McLeMore are Wardens at the SPSM facilities; Travis Jones; Harold White; David Jamrod; and Carmen Palmer are Deputy Wardens at the SPSM facilities. David Laurin; Fred Parker; Marilyn Ruben; and Mike Rankin are Business Managers. Marjorie VanOchten is Administrator for Office of Policy and Hearings.[1]

Respondents, Everett Hadix; Richard Mapes; Patrick C. Sommerville; Roosevelt Hudson, Jr.; Brent E. Koster; Lee A. McDonald; Darryl Sturges; Robert Flemster; William Lovett; James Covington; James Hadix; and several John Does, are persons who are or were confined in the custody of the Michigan Department of Corrections.

McGinnis v. Glover:

Petitioners, Kenneth McGinnis is Director of the MDOC; Griffin Rivers is Director of MDOC's Bureau of Programs; Dan Bolden is Director of MDOC's Bureau of Correctional Facilities; Lloyd Kimbrell is Director of MDOC's Bureau

[1] These petitioners are the successors in office to Perry Johnson, Robert Brown, Graham Allen, Dale Foltz, Elton Scott, Pam Withrow, Frank Elo, John Jabe, Charles Utess and John Prelesnik, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. A number of these positions have been expanded from one person to four people as the prison has been divided and each has been assigned its own staff hierarchy. Marjorie VanOchten's previous title was Hearings Administrator.

of Prison Industries; Robert Steinman is Director of the MDOC's Bureau of Field Services; Joan Yukins is Warden of the Scott Correctional Facility; Sally Langley is Warden of the Florence Crane Correctional Facility.[2]

Respondents, Mary Glover; Lynda Gates; Jimmie Ann Brown; Manetta Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated are persons who are or were confined in the custody of the Michigan Department of Corrections.

[2] These petitioners are the successors in office of Perry Johnson, William Kime, Robert Brown, Jr., Frank Beetham, and Richard Nelson, respectively, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. Gloria Richardson, Dorothy Costen, and Clyde Graven, all listed as Defendants in the original action, are no longer Defendants due to the closure of certain facilities as women's prisons. Joan Yukins, and Sally Langley were added as Defendants due to the opening of new facilities for women prisoners. Florence R. Crane, G. Robert Cotton, Thomas K. Eardley, Jr., B. James George, Jr., Duane L. Waters, and the Michigan Corrections Commission are no longer Defendants due to the dissolution of that Commission.

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The opinion of the Court of Appeals is reported at *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. April 17, 1998) and is reproduced in the Appendix to the Petition, Pet. App. 1a. Rehearing was denied June 18, 1998. Pet. App. 42a. The prior opinions of the United States District Court for the Eastern District of Michigan, *Hadix v. Johnson* (No. 80-73581, December 4, 1996) and *Glover v. Johnson* (No. 77-71229, December 4, 1996) are not officially reported, and are reproduced at Pet. App. 27a, 33a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on April 17, 1998. On June 18, 1998, the Court of Appeals issued its Order denying Petitioners' Petition for Rehearing En Banc. Pet. App. 42a.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 802(b)(1) of the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

Section 803(d) of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), amending section 7 of the Civil Rights of Institutionalized Persons Act provides:

(d) ATTORNEY'S FEES.

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. § 1988), such fees shall not be awarded, except to the extent that -

(A) the fee was directly and reasonably incurred in proving an actual violation of the Plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation;

or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the Defendant. If the award of attorney fees is not greater than 150 percent of the Judgment, the excess shall be paid by the Defendant.

(3) No award of attorney fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the Defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. § 1988).

The PLRA's effective date was April 26, 1996.

STATEMENT OF THE CASE

A. The Court of Appeals Opinions.

In three decisions (*Glover v. Johnson*, 138 F.3d 229, 246-251 (6th Cir., 1998), App. 164a, 194a-205a ; *Hadix v. Johnson*, 144 F.3d 925, 946-948 (6th Cir., 1998) App. 96a, 98a-102a; and the present consolidated cases, *Hadix v. Johnson*, 143 F.3d 246; Pet. App. 1a-26a) the Court of Appeals held that the PLRA attorney fee limitation does not apply to fees awarded for services rendered in any case pending on the effective date of the Act.

The Court of Appeals opinion below summarized the nature of this case and the course of proceedings, 143 F.3d at 248-250; Pet. App. 2a-7a:

> The major issue before us is whether the attorney fee limitation of section 803(d) of the Prison Litigation Reform Act ("PLRA" or the "Act"), 42 U.S.C. § 1997e(d) applies to work performed after the PLRA's enactment date of April 26, 1996 in a case filed before the enactment date. Section 803(d), among other things, places a cap on the hourly rate attorneys may be awarded under 42 U.S.C. § 1988 in civil rights litigation brought by prisoners. 42 U.S.C. § 1997e(d)(3). Recently, in a separate *Glover* appeal, we held that section 1997e(d) does not apply to work performed prior to the PLRA's enactment. *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998).[3] For reasons fully explained below, we conclude that section 1997e(d) is likewise inapplicable to post-enactment work. Neither the language of the statute nor the legislative history permits us to conclude that Congress intended to differentiate between pre-enactment and post-enactment services.

[3] [App. 164a. Note: Petitioners did not file a petition for writ of certiorari from this decision, but the opinion is reproduced in the Joint Appendix, in response to the second issue specified in this Court's order granting the petition in the present case. See also, *Hadix v. Johnson*, 144 F.3d 925, 946-948 (6th Cir., 1998.)]

* * *

I. OVERVIEW OF THE LITIGATION

A. *Glover v. Johnson*

In 1977, a now-certified class of female inmates incarcerated in the Michigan prison system, filed an action pursuant to 42 U.S.C. § 1983 in which they alleged violations of certain constitutional rights surrounding the conditions of their confinement. The District Court found that the *Glover* plaintiffs had been denied the same vocational and educational opportunities provided to male inmates, in violation of the Equal Protection Clause of the Fourteenth Amendment, and that the female inmates had been unconstitutionally denied meaningful access to the courts. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979) ("*Glover I* "). After extensive negotiations, the District Court entered an order specifying remedial actions to be undertaken by the defendants to remedy the constitutional violations found and retained jurisdiction until substantial compliance with the remedial order is achieved. *Glover v. Johnson*, 510 F. Supp. 1019 (E.D. Mich. 1981) ("*Glover II*"). Neither of these orders were appealed by defendants.

On November 12, 1985, the parties stipulated to an order of the District Court, which awarded plaintiffs attorney fees, including fees for monitoring defendants' compliance with the District Court's orders, and established a system providing for plaintiffs' submission of fees and costs on a semi-annual basis and for the lodging of defendants' objections thereto. [App. 125a] This 1985 Order, which plaintiffs contend establishes their entitlement to monitoring fees,

has never been appealed. It provides in relevant part:

> IT IS HEREBY ORDERED that Plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months. Defendants will have twenty-eight days in which to contest the amount of the fee request.

Thus, since 1985, the parties have followed this procedure and plaintiffs' attorneys have been paid attorney fees at the prevailing market rate, which has increased over the years, to the current rate of $150.00 per hour. In a Memorandum Opinion and Order dated November 27, 1989 (the "1989 Order"), the District Court interpreted its 1985 Order as authorizing attorney fees for monitoring compliance with the court's orders in this case in addition to non-monitoring legal work, and as having decided the prevailing party issue. [App. 130a] It also held that the prevailing party issue will not be re-decided with each petition for fees, and that the court is therefore not required to await the completion of an appeal before determining whether plaintiffs are prevailing parties on otherwise compensable work. Defendants appealed the 1989 Order, and this Court affirmed the District Court's holdings. *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991) ("*Glover III* ").

B. *Hadix v. Johnson*

In 1980, a class of male prisoners incarcerated in the State Prison of Southern Michigan, Central Complex ("SPSM-CC"), brought a class action pursuant to 42 U.S.C. § 1983 alleging violations of their rights under the First, Eighth, Ninth and Fourteenth

Amendments to the Constitution. The parties entered into a comprehensive consent decree, which was approved by and made an order of the District Court on April 4, 1985. The detailed 33-page consent decree addresses sanitation, health care, fire safety, overcrowding, volunteers, access to courts, food service, management, operations and mail at SPSM-CC and called for the submission of more detailed remedial plans to carry out a number of the consent decree mandates. Overall, the consent decree was intended to "assure the constitutionality" of the conditions of confinement at SPSM-CC. The Court retained jurisdiction to enforce the terms of the consent decree until compliance is achieved. Plaintiffs' attorneys have responsibility for monitoring defendants' compliance with the decree, which continues to this day.

On November 19, 1987, the District Court entered an order awarding fees and costs to plaintiffs' attorneys for compliance monitoring. [App. 79a] Plaintiffs construe this order as establishing their entitlement to post-judgment monitoring fees. Under the terms of this order, defendants have the right to review and make objections to plaintiffs' fee requests. In the absence of agreement, the District Court will resolve the fee dispute.

II. PROCEEDINGS BELOW

In *Glover* and *Hadix*, each class of plaintiffs filed a fee petition for work performed from January 1, 1996 through June 30, 1996 pursuant to established procedure. Appeal Nos. 96-2586/2588 and 96-2567/2568. The *Glover* plaintiffs filed a second fee petition that covered all outstanding fees and costs related to work on two appeals. Appeal No. 97-1272. Defendants objected on several grounds to all

three petitions. The District Court rejected all but one of the objections in three separate orders.

Defendants argued that the attorney fee limitation of the PLRA should be applied to the fee petitions in appeal Nos. 96-2586/2588 and 96-2567/2568. In nearly identical opinions, the District Court held the fee provision inapplicable to fees earned before enactment of the PLRA but applied it to those earned thereafter. [Pet. App. 27a, 33a.]

Defendants also objected to fees for work on all appellate matters in the *Glover* fee petitions in appeal Nos. 96-2586/2588 and 97-1272, which included work on three appeals, because plaintiffs had not prevailed in these matters. The first involves Case No. 94-1617, a 1996 appeal regarding defendants' obligation to provide legal assistance to plaintiffs for parental rights matters. This case has been decided against plaintiffs and the Supreme Court has denied their petition for certiorari. *Glover v. Johnson*, 75 F.3d 264 (6th Cir.) ("*Glover IV* "), *cert. denied*, ___ U.S. ___, 117 S. Ct. 67, 136 L.Ed.2d 28 (1996) (hereinafter referred to as the "parental rights appeal"). The second involves appeal Nos. 95-1903/95-2037/95-2120/96-1155, consolidated appeals regarding a Compliance Committee established by the District Court (hereinafter referred to as the "Compliance Committee appeals"). These appeals were voluntarily dismissed by stipulation of the parties in March, 1996 upon dissolution of the Committee by the District Court. The third involves appeal No. 95-1521, an appeal regarding the District Court's denial of defendants' motion to terminate the District Court's supervisory jurisdiction because substantial compliance with the Remedial Plan had been achieved (hereinafter referred to as

the "termination appeal"). We recently vacated this judgment, retained jurisdiction and remanded the matter to the District Court for a new determination of whether a disparity now exists between female and male inmates in educational and vocational opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment and whether female inmates are presently being denied access to the courts in violation of the First Amendment. *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998) ("*Glover V*"). [App. 164a.]

In rejecting this challenge, the District Court concluded that plaintiffs were deemed prevailing parties in the 1985 Order, that plaintiffs are not required to establish prevailing party status each time fees are sought but instead need only establish that the legal work was reasonably related to ensuring compliance with the District Court's orders. The District Court went on to conclude that the legal work at issue in all three appeals was related to monitoring compliance with the Remedial Plan and consequent court orders.

The District Court also rejected defendants' objection that the award in No. 96-2586/2588 was otherwise unreasonable as conclusory and unsubstantiated. Finally, the District Court declined to increase the rate of payment for a paralegal to the prevailing market rate because she had been approved at an established lower rate. Defendants and plaintiffs filed timely notices of appeal and cross-appeal. [FN1]

FN1. Plaintiffs filed a motion for reconsideration of the constitutional challenges they made to the PLRA's fee provision in *Glover*, No. 96-2586/2588, which the court denied. Plaintiffs timely appealed the denial of its motion. Because we decide that the PLRA

> fee provision is inapplicable to this case, we need not and do not reach plaintiffs' constitutional arguments.

B. The Prison Litigation Reform Act (PLRA).

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), (PLRA), was signed into law by President Clinton and took effect on April 26, 1996. The PLRA was intended to curtail the overly intrusive involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees such as those involved in *Glover* and *Hadix*. *See, e.g.*, 141 Cong. Rec. S 14315 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) ("The legislation I am introducing today [S. 1275] will return sanity and State control to our prison systems by limiting judicial remedies in prison cases [such as those in the State of Michigan] . . . ."); 141 Cong. Rec S 14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) ("these guidelines will work to restrain liberal federal judges who see violations on [sic] constitutional rights in every prisoner complaint who have used these complaints to micromanage state and local prisons."). The authors of the PLRA expressed great concern about the cost of prison litigation to state and local governments. When introducing S. 1279, Senator Dole expressed dismay that prison litigation cost the states $81 million annually. 141 CONG. REC. S 14413 (daily ed., Sept. 27, 1995). Senator Hatch, noting that 45% of all federal civil cases in Arizona in 1994 had been filed by prisoners, declared that "it is time to wrest control of our prisons from the lawyers and the inmates * * *." *Id.* at 14418. *See, also.*, 141 Cong. Rec. S 14312, S 14316 (daily ed. September 26, 1995) (statement of Sen. Abraham) (one goal of PLRA is to reduce litigation which "raises the cost of running prisons far beyond what is necessary"). In the House, the committee report noted that costs to state and local governments would be reduced by a more proportional system for awarding fees and by eliminating financial incentives to litigate such ancillary matters as, notably, fee petitions. H.R. Rept. 104-21, "Violent Criminal Incarceration Act of 1995" at 28 (Feb. 6, 1995).

A second purpose of the PLRA was to stem the tide of frivolous prisoner suits. *See, e.g.*, 141 Cong. Rec. S 14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) (in addition to problems with "massive judicial interventions in state prison systems, we also have [the problem of] frivolous inmate litigation); 141 Cong. Rec. S 14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) (legislation introduced, S. 1279, will address the "alarming number of frivolous lawsuits" filed by prisoners). Section 803(d) of the PLRA, 42 U.S.C. § 1997e(d)(3), includes the provision governing the award of attorney fees in prisoner civil rights litigation. It provides in relevant part:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. § 1988), such fees shall not be awarded, except to the extent that --
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

In the United States District Court for the Eastern District of Michigan, $75.00 per hour is the maximum amount a court-appointed attorney may be reimbursed pursuant to 18 U.S.C. § 3006A(d)(1). The established rate of pay for Respondents' attorneys in both cases has been $150.00 per hour since at least 1993. The PLRA cap on attorney fees would reduce this amount to $112.50 per hour.

SUMMARY OF ARGUMENT

The plain text of section 803(d), the nature of attorney fee awards and this Court's longstanding retroactivity jurisprudence all support the conclusion that the attorney fee limitation applies to attorney fee awards made after the effective date of the Act, regardless when the services were rendered.

The clear and unambiguous words of the statute apply to all pending cases and all awards of attorney's fees made after the Act's effective date: "In *any* action brought by a prisoner who *is* confined. . . in which attorney fees are authorized. . . . No *award* . . . shall be based. . . ."

Even though the statute does not expressly state that it is applicable to pending cases, this Court's longstanding retroactivity jurisprudence compels that result. Questions of attorney's fees are "collateral to the main cause of action" and are "uniquely separable" from it. *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994). Fee shifting statutes like the one at issue here are procedural in nature, prospective and injunctive in operation and do not involve vested rights. Because the desire for attorney's fees at an ever-increasing "prevailing rate" is merely a unilateral hope rather than an entitlement, applying an intervening fee shifting statute in pending litigation does not result in any unfairness. The appropriate compensation for plaintiffs' counsel in prison condition cases is subject to the discretion of Congress and there is no constitutional, statutory or jurisprudential reason not to give effect to Congress's obvious intent in all cases where attorney's fee awards are made after the effective date of section 803(d) regardless when the services were rendered.

ARGUMENT

THE ATTORNEY FEE PROVISION OF PLRA SECTION 803(d) APPLIES TO FEES AWARDED AFTER THE EFFECTIVE DATE OF THE ACT FOR SERVICES RENDERED BEFORE AND AFTER THAT DATE.

In determining a statute's temporal reach, this Court has said that the normal rules of construction apply. *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 2063 (1997). With respect to a claim that a statute enacted during the course of litigation has an impermissibly retroactive effect, the Court has also noted the tension between two seemingly contradictory principles of interpretation:

> The first is the rule that "a court is to apply the law in effect at the time it renders its decision," *Bradley [v. Richmond School Board*, 416 U.S. 696], at 711, 40 L. Ed. 2d 476, 94 S. Ct. 2006. The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen [v Georgetown Univ. Hospital*, 488 U.S. 204,] at 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 [(1988)].

Landgraf, 511 U.S. at 264. In *Landgraf*, the Court noted that the *Bradley* principle of applying the law in effect at the time of decision did not "displace the traditional presumption against applying statutes affecting substantive rights, liabilities or duties to conduct arising before their enactment." 511 U.S. at 278. For such "genuinely 'retroactive'" substantive statutes, 511 U.S. at 277, the Court went on to articulate the appropriate analysis, 511 U.S. at 580:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach.

> If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Statutes concerning attorney's fees do not meet the criteria of "affecting substantive rights, liabilities or duties." *Landgraf*, 511 U.S. 278. Application of the fee limitation to awards made after the effective date of the PLRA is clearly intended by the language of the statute, does not have a retroactive effect and would not result in a manifest injustice.

A. The Plain Language of PLRA Section 803(d) Makes It Applicable to All Fees Awarded After the Effective Date of the Act For Services Rendered Before and After That Date

Under the first step of the *Landgraf* analysis, the Court must consider whether "Congress has expressly prescribed the statute's proper reach." Although neither the text nor the legislative history of the PLRA expressly address the precise question of whether the attorney's fee provision applies to cases pending on the Act's effective date, the text offers significant guidance.

The plain language of PLRA, section 803(d), makes it applicable to all attorney fee awards after the effective date of the Act, no matter when the litigation was begun or when the services were rendered. The attorney fee provision unmistakably applies to "*any* action *brought* by a prisoner who *is* confined to any jail, prison, or other correctional facility." Section 803(d)(1)(emphasis added). Regardless when the case

was filed, the Act applies; the statute by its terms targets any post-enactment award in "any" action "brought" by any person who "is" confined as of the effective date. The use of the absolute "any," the use of the past-tense verb "brought" and the application to all current prisoners all support the conclusion that the text is simply not susceptible to another meaning. *See, Madrid v. Gomez*, 150 F. 3d 1030, 1035 (9th Cir., 1998). The "in *any* action *brought* by a prisoner who *is* confined" language uses no words of temporal restriction, plain or obscure. On its face, it is comprehensive, embracing *all* such actions, irrespective of when they were filed or when services were rendered. The word "any" is absolute and all-encompassing. In its conventional usage, "any" means "ALL - used to indicate a maximum or whole." *Webster's Ninth Collegiate Dictionary*, 93 (1st ed. 1986).

In *Hutto v. Finney*, 437 U.S. 678, 694 (1978) this Court rejected an Eleventh Amendment challenge to an award of attorney fees assessed as part of costs and interpreted language in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 which also applies in the present case: "In any action . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee. . . ." The Court said, 437 U.S. at 694:

> The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception. . . ."

Cf. United States v. Williams, 514 U.S. 527, 531-532 (1995) (the statutory words "Any civil action . . . for the recovery of any . . . tax alleged to have been erroneously . . . collected" found to demonstrate the "unequivocally expressed" intent of Congress to waive immunity). In *Lindh v. Murphy*, 521 U.S. 320; 138 L. Ed. 2d 481, 117 S. Ct. at 2064, n. 4. (1997), the Court acknowledged the force of categorical language such as "all" and "any" and quoted the unenacted precursor to the statute addressed in *Landgraf* as an example of language that might qualify as a clear statement: "[This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act." *Id.*

The only way to foster an alternative meaning for the word "any" would be to add language to what Congress has written. The attorney fee provision operates in "any action," not in "any action filed after the effective date." *Id.* A court should not alter a statute's effect by reading into the text words which Congress chose to omit.

In *Alexander S. v. Boyd*, 113 F.3d 1373, 1386 (1997), *cert. den.* 139 L. Ed. 2d 869 (1998), the court held section 803(d) applicable to all awards of attorney fees after the effective date of the Act, regardless of the date the services were performed, and its analysis correctly applied the statutory language:

> The plain language of the statute mandates that all attorney's fees awarded after April 26, 1996, in any prison conditions lawsuit comply with the restrictions imposed by the PLRA. *See Williams v. U.S. Merit Sys. Protection Bd.*, 15 F. 3d 46, 49 (4th Cir. 1994) (stating that "[s]tatutory construction begins with a examination of the literal language of the statute" (quotations omitted)). There is, quite simply, no award until an order is issued, and all of the orders appealed were entered after the statute's enactment. Congress could have easily inserted language to restrict the application of these limitations to awards for work performed subsequent to the PLRA's enactment, but it did no do so. (Footnotes omitted.)

Judge Motz, concurring in the judgment, also used a correct analysis, 113 F.3d at 1392:

> The plain language of the statute directs that it applies when a court makes its award, not when an attorney completes his work, or totals his time, or submits his fee request, but when a court awards fees. Therefore, the only "retroactivity" question involving § 1997(d)(3)

> is whether it applies to fees awarded before its enactment. Because the fees at issue here were awarded . . . a month after the effective date of the statute (April 26, 1996) this case presents no retroactivity question.

Although it erroneously declined to apply section 803(d) to any pending case, even the Court of Appeals in the present case recognized that the applicability of the statute cannot turn on the timing of the work. *See*, Pet. App., 11a. ("We do not believe the statutory language is capable of such a sophisticated construction.") Moreover, section 803(d)(3) emphatically states: "*No* award of attorney's fees shall be based on an hourly rate greater than [$112.50]." 42 U.S.C. § 1997e(d)(3) (emphasis added). There can be only one interpretation of this word: "No" means "no." *See, Madrid* at *10-11.

As recently noted by the Court of Appeals for the Ninth Circuit in determining that the attorney fee limitation of the PLRA applies to cases which are pending at the time of its enactment:

> We acknowledge that Congress could have been even more precise than it was. For example, it could have added a sentence at the end of § 803 reciting that the attorney's fee provisions "apply both to cases pending on and to cases commenced after the enactment date." However, the Supreme Court has never required the most emphatic possible articulation of a statement, only an unambiguous directive. Indeed, in *Landgraf*, as Justice Scalia noted with dismay, the Court was even willing to look to legislative history to find a clear statement. See *Landgraf*, 511 U.S. at 287 (Scalia, J., concurring)(citing *Landgraf*, 511 U.S. at 257-63); *see also Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 184, 1 L. Ed. 2d 746, 77 S. Ct. 707 (1957) ("It is clear from the language of the section and its legislative history that Congress thereby confirmed the

> authority of the Commissioner to correct any ruling, regulation, or Treasury decision retroactively . . . ."](emphasis added). We therefore conclude that Congress's use of the word "any" unambiguously indicates that the PLRA's attorney's fee provisions apply to all actions, irrespective of when they were filed.

Madrid, supra, 150 F.3d at 1036-1037 (footnotes omitted).

B. Comparison of PLRA Section 802 with PLRA Section 803(d) Does Not Permit the Negative Inference That Congress Intended Section 803(d) to Apply Only to Cases Filed After the Enactment of the PLRA.

Despite the broad language of the statutory text, the Court of Appeals incorrectly concluded that Congress intended not to apply the fee provisions to pending cases. The PLRA is comprised of ten sections; the attorney fee provisions, codified at 42 U.S.C. § 1997e(d), are contained in section 803. Only section 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions.[4] According to the Court of Appeals' Opinion, the fact that Congress expressly applied section 802 to pending cases and did not expressly do so in the attorney fee provisions of section 803(d) leads to the inference that Congress intended the fee provisions to apply only to cases filed after the Act's passage. Pet. App., 1a. Petitioners contend the Court of Appeals reads too much into Congress's silence.

Contrary to the Court of Appeals decision, Congress's prescription of the temporal reach of section 802 of the PLRA has no implications for the Act's attorney fee provisions. Where, as here, two provisions have distinctly different

[4] Section 802(b)(1) of the PLRA provides: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."

effects, the presence of an express temporal limit in one has little bearing on the absence of an express limit in the other. *See Lindh v. Murphy, supra*. In *Lindh*, this Court was presented with the question whether the Antiterrorism and Effective Death Penalty Act's (AEDPA) amendments to chapter 153 of Title 28 applied to cases pending at enactment. As here, Congress was silent as to the amendments' temporal reach. However, Congress explicitly provided that the AEDPA's amendments to another chapter, chapter 154 of Title 28, "shall apply to cases pending on or after the date of enactment of the Act." Pub. L. No. 104-132, § 107(c), 110 Stat. 1214 (Apr. 24, 1996).

In determining what implications to draw from Congress's different treatment of the two sets of amendments, this Court compared the effects of the two provisions. The amendments to chapter 153 created new standards for the review of habeas corpus petitions filed by state prisoners; likewise, the amendments to chapter 154 created new standards for the review of habeas corpus petitions filed by state prisoners under capital sentences. *Lindh*, 117 S. Ct. at 2063-64. The fact that both provisions "govern standards affecting entitlement to relief" was "significant" to this Court. *Id*. at 2064. In part because of this similarity, this Court concluded that Congress's silence with regard to the temporal reach of the chapter 153 amendments could be read as signaling its intent that the amendments not be applied to pending cases. *Id*. at 2064-65.

Both AEDPA chapters considered in *Lindh* established the standard for review for habeas corpus petitions filed by state prisoners. No such similarity exists between sections 802 and 803 of the PLRA. Section 802 of the PLRA creates new standards for awards of prospective relief in litigation over prison conditions. It prohibits the award of prospective relief unless the relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." Section 802(a), 18 U.S.C. § 3626(a)(1). Moreover, it provides for "immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court" that the new conditions just

described were met. Section 802(a), 18 U.S.C. § 3626(B)(2) ("immediate termination provision"). At the time of the Act's passage, numerous awards of prospective relief already existed, over which many federal judges across the country retained continuing jurisdiction. In light of those existing orders, it is unsurprising that Congress made its intentions -- that the new substantive provisions would in fact apply to those orders -- absolutely clear.

By contrast, the provisions at issue here -- located in section 803 of the Act -- merely govern the award of attorney fees. The provisions have no effect on the substantive judgments or awards already entered. These provisions thus have nothing in common with section 802 of the Act. Congress's decision to affirmatively prescribe the temporal reach of section 802, therefore, has no bearing on Congress's silence on the reach of the fees provisions. *See, Id.* The failure of Congress to include language in section 803 specifically dealing with pending cases is not a case where "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n. 23 (1991)

The Court of Appeals reviewed a part of the legislative history and conceded that the negative inference to be drawn from the Senate's decision to include the attorneys' fees provision in section 803 rather than in section 802 "is weaker than the inference drawn in *Lindh*." (Pet. App., p. 16a). Despite this concession, the Court erroneously concluded: "Nonetheless, the identical negative inference that was drawn in *Lindh* can be drawn when sections 802 and 803 are compared." *Id.* Section 802, the Court wrote, was addressed to restrain perceived judicial excesses in prison litigation, past and future. By contrast, section 803 is "forward looking," "aimed at the filing of frivolous lawsuits." (Pet. App., p 16a).

The Court of Appeals' analysis is flawed for a number of reasons. First, *Lindh* found a negative inference to be justified only when two parts of a statute are so closely related that the strong implication is that, in choosing different language, Congress drew a "deliberate * * * contrast" between them. *Lindh*, 117 S. Ct. at 2065. Where statutory provisions are less closely related, the negative inference is far weaker, especially

when other textual pointers suggest a different result. *See, Field v. Mans*, 516 U.S. 59, 67-68, 75 (1995). In *Lindh*, chapters 153 and 154 were complementary halves of the entire habeas corpus portion of Title 28. Similarly, *Field* compared two paragraphs of a Bankruptcy Code subsection. By contrast, sections 802 and 803 amend disparate laws in Titles 18 and 42.

More importantly, the subject-matters of sections 802 and 803 are wholly distinct. Section 802 sets substantive limits on prison reform litigation. Under *Landgraf*, an express direction by Congress was necessary to limit previously issued injunctions.[5] Without the language in section 802, courts would be under no obligation to amend those injunctions or bring them to an end. The absence of similar language in section 803 of the PLRA is easily explained because there is no similarly compelling reason to specify that the law will apply to conduct -- such as work to be done by lawyers in the future --which would occur only after the Act's effective date.

Second, *Lindh* found it critical -- even dispositive -- that chapters 153 and 154 both fell on the substantive side of the *Landgraf* default rule. *Lindh*, 117 S. Ct. at 2063-2064. That permitted this Court to conclude that Congress, legislating with presumed knowledge of *Landgraf's* "predictable background rule" (*Landgraf*, 511 U.S. at 273), had deliberately chosen to treat chapters 153 and 154 disparately. The *Lindh* analysis yields an entirely different result here. Section 802, designed to reopen existing injunctions, reaches the merits of the litigation and is plainly substantive. By contrast, section 803(d) in the present context, deals only with attorney fees and is considered procedural and collateral. *Landgraf*, 511 U.S. at 277. In light of Congress's presumed familiarity with *Landgraf*, *Lindh* compels the conclusion that Congress intended both sections to apply to pending litigation despite differences in language. Under *Landgraf* and *Lindh*, section 802 is substantive and, therefore, retroactive because Congress explicitly said so; section 803(d) applies to pending cases because Congress knew it to be procedural.

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5 *See, e.g.*, 18 U.S.C. § 3626(b)(2), as amended by PLRA § 802(a), which permits the immediate termination of prospective relief if the relief had been approved or granted without a finding now required by the PLRA.

Third, the Court of Appeals misunderstood the purpose of the PLRA's attorney fee provisions and therefore mistakenly assumed that the provisions could only be "forward looking." (Pet. App., 16a). The purpose of the fee provisions was plainly *not* to curtail frivolous lawsuits, as the Sixth Circuit supposed. Fees are never awarded unless the plaintiff is the prevailing party. By definition, if the plaintiff is entitled to fees, it is because the litigation was *not* frivolous. The more likely explanation for § 803(d) is that Congress wanted to protect state and local government treasuries from the enormous costs of *successful* litigation. Without restrictions, fee-shifting substantially increases the financial burden of prison litigation, sometimes exceeding the other costs of court-ordered relief. That is especially so when monitoring by counsel extends over decades, as in these cases. In Michigan alone, the difference between paying attorney fees at prevailing market rate and paying at the lower PLRA limited rate from 1996 through June 1998 amounts to approximately $548,000 in four pending class-action prison condition cases. That difference will be intensified since plaintiffs' counsel is seeking an increase in their hourly rate from $150 per hour to $200 per hour beginning in January, 1998.

Congress's concern about this financial hemorrhaging is not inherently "forward looking," as the lower court incorrectly assumed. Congress was fully aware of the seemingly endless nature of much prison litigation. It is far more likely, therefore, that Congress intended the attorney fee provisions to apply to pending litigation, especially for work performed after the PLRA's effective date, in order to give states and local governments immediate relief from the future long-term, expenses of existing litigation. *Cf. Landgraf*, 511 U.S. at 267-268 ("Retroactivity provisions often serve entirely benign and legitimate purposes . . . [such as] simply to give comprehensive effect to a new law Congress considers salutary").

The Court of Appeals erred in drawing any negative inferences from the express inclusion of a provision making section 802 applicable to pending cases and the absence of such an express provision from section 803(d). *Landgraf*, 511 U.S. at 259 (rejecting argument that "because Congress

provided specifically for prospectivity in two places . . . we should infer that it intended the opposite for the remainder of the statute").

C. Applying the Attorney Fee Provisions to Awards Made After the PLRA's Effective Date in Pending Litigation Will Have No Impermissible Retroactive Effect.

A statute is not retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment, . . . or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Nor is it retroactive simply because it "draws upon antecedent facts for its operation," because it might be unfair or because it might operate to a party's disadvantage. *Id.*, at 267, 275 n.28.

> Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 511 U.S. at 269-270. *See, id.*, at 269 n.23 citing, *inter alia*, *Miller v. Florida*, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'") and *Sturges v. Carter*, 114 U.S. 511, 519 (1855) (a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability"). The presumption against retroactive legislation is grounded in "[e]lementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and *to conform their conduct accordingly*." *Landraf*, 511 U.S. at 265. (emphasis added); *see also, Id.* at 270 ("familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining whether a statute would have

a retroactive effect). Thus, a statute would have a retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. at 280. In *Landgraf*, 511 U.S. at 277-278, this Court noted the "traditional presumption" against applying "genuinely 'retroactive'" statutes affecting "substantive rights, liabilities or duties" to conduct arising before the enactment, but also noted the continuing vitality of the *Bradley* principle of applying the law in effect at the time of a court's decision. In the present case, applying the attorney fee provisions only to awards made after the PLRA's passage would have no impermissible retroactive effect.

This Court has recognized at least three situations in which application of an intervening statute is "unquestionably proper": statutes conferring or ousting jurisdiction, statutes affecting matters of procedure (in which parties have "diminished reliance interests") and statutes affecting the propriety of prospective relief. *Landgraf*, 511 U.S. at 273-275. The latter two are particularly relevant in the present case. In *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) this Court unanimously held that a statute permitting an award of attorney fees which was enacted while the case was pending should be applied. The Court relied upon the principle that a court should apply the law in effect at the time it renders its decision unless manifest injustice would result and in order to evaluate whether injustice occurred, the Court examined the nature and identity of the parties, the nature of their rights and the nature of the impact of the change in law upon those rights. *Bradley*, at 716-717. It concluded that application of the new attorney fee statute would not "infringe upon or deprive a person of a right that had matured or become unconditional" and would not cause a "change in the substantive obligation of the parties." *Bradley* at 720, 721. This is fully consistent with this Court's attorney fee jurisprudence which clearly establishes that questions of attorney fees are incidental to, and independent from, the underlying substantive cause of action. As this Court said in *Landgraf*, 511 U.S. at 277:

> [T]the attorney's fee provision at issue in *Bradley* did not resemble the cases in which we have invoked the presumption against statutory retroactivity. Attorney's fee determinations, we have observed, are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-452, 71 L. Ed. 2d 325, 102 S. Ct. 1162 (1982). *See also. Hutto v. Finney*, 437 U.S. 678, 695, n 24, 57 L. Ed. 2d 522, 98 S. Ct 2565 (1978)

The underlying litigation in the present case did not seek money damages, but rather sought declaratory and injunctive relief, which are inherently prospective in nature, and this prospectivity is a further reason for concluding that section 803 is not retroactive. *Landgraf*, 511 U.S. at 273-274, citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921) for the propositions that "relief by injunction operates *in futuro*,"and that the Plaintiff had no 'vested right' in the decree entered by the trial court." Moreover, several post-*Bradley* decisions have determined that applying new statutory provisions regarding attorney fee provisions to pending civil actions does not "impose an additional or unforeseeable obligation" upon the parties. *Landgraf*, 511 U.S. at 278; *see, e.g., Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917, 922-23 (2nd Cir. 1992) (finding no retroactivity issue to exist where fees were awarded only for the period subsequent to passage of a new amendment); *Simmons v. Lockhart*, 931 F.2d 1226, 1229-1231 (8th Cir. 1991) (awarding fees under old scheme for work performed before passage of new provision, and under new scheme for work performed after enactment); *Alexander S. v. Boyd*, 113 F.3d 1373, 1387-1388 (4th Cir. 1997) *cert. den.* 139 L. Ed. 2d 869 (1998).

The fact of prospectivity in the present case is reinforced when it is recalled that the substantive question of liability was resolved years ago and the fees respondents now seek are for monitoring compliance with long-established orders. The attorney fees in the present case are prospective and

procedural rather than substantive in nature. While attorney's fee statutes are intended "to ensure 'effective access to the judicial process' for persons with civil rights grievances, *Hensley v. Eckerhart*, 461 U.S. 424, 429 (quoting H.R. Rep. No. 94-1558, p 1 (1976)), in the present case that purpose has long since dissipated. In an earlier appeal in this very litigation the Court of Appeals rejected respondents' efforts to have the petitioners pay for expensive, out-of-state expert counsel and said, *Hadix v. Johnson*, 65 F.3d 532, 535(6th Cir. 1995):

> The case at bar is unlike most complex institutional litigation, where the time commitment and uncertainty of payment often discourage economically rational private attorneys from becoming involved. The predominant reason institutional reform plaintiffs usually have difficulty finding counsel, as the Supreme Court observed in connection with contingent-fee arrangements, is that "in any legal market where the winner's attorney's fees will be paid by the loser ... attorneys [are likely to] view [the] case as too risky (i.e., too unlikely to succeed)." *City of Burlington v. Dague*, 505 U.S. 557, 564, 112 S. Ct. 2638, 2642, 120 L. Ed. 2d 449 (1992).

No such risk is present here. The consent decree that governs this case virtually guarantees fee awards. The case is hardly renowned for a lack of litigiousness, moreover, and it shows few signs of winding down. From counsel's standpoint, *Hadix* more closely resembles a cash cow than a bottomless pit. It is highly likely that the guaranteed stream of income this litigation offers would prove a more potent lure for competent counsel than the more ephemeral promise of a fee award at counsel's usual rate in the case of victory--and it is the desire to "achieve the ... goal of mirroring market incentives" that drives the policy underlying the fee-shifting statutes. Dague, 505 U.S. at 563-65, 112 S. Ct. at 2642; *see also*

> *Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1449 (3d Cir. 1988). (Footnote omitted.)

There is no impermissible retroactivity merely because legislation affects conduct that was based upon prior existing law. "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central RR Co. v. White*, 243 U.S. 188, 198 (1917); *see Landgraf*, 511 at 269, n. 24, quoting L. Fuller, The Morality Of Law 60 (1964):

> A man may decide to study for a particular profession, to get married, to limit or increase the size of his family, to make a final disposition of his estate--all with reference to an existing body of law, which includes not only tax laws, but the laws of property and contract, and perhaps, even election laws which bring about a particular distribution of political power. If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.

An award of attorney's fees under 42 U.S.C. § 1988 is discretionary and the applicant for fees bears the burden of establishing the appropriateness of an award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). There is no guarantee that fees will be recovered at all, *Kentucky v. Graham*, 473 U.S. 159, 168 (1985), and it is clear that Congress bestowed fee eligibility on the "prevailing *party*" not the attorneys. *Evans v. Jeff D.*, 475 U.S. 717, 731-732 (1986) (emphasis in original). At the commencement of this litigation neither Respondents nor their attorneys had any claim of entitlement to attorney's fees at all, much less at any particular rate. At most they had a unilateral hope. Since Respondents prevailed, Petitioners acknowledge that Respondents are eligible under 42 U.S.C. § 1988 to some fees, but they still have no entitlement to any particular rate. Their desire for awards at constantly-increasing prevailing rates remains no more than a unilateral

expectation. In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989) this Court discussed the difficulties of using the mental state of the parties as the basis for determining questions of attorney's fees. In deciding the proper standard for determining whether a party has "prevailed" so as to be eligible for an award of fees the Court rejected a test which required a determination whether the party succeeded on "the central issue" since that would require an unwieldy and impractical examination of thought processes, 489 U.S. at 791:

> Nor does the central issue test have much to recommend it from the viewpoint of judicial administration of § 1988 and other fee shifting provisions. By focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer. Is the "primary relief sought" in a disparate treatment action under Title VII reinstatement, backpay, or injunctive relief? This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee applications in an inquiry which two commentators have described as "excruciating." *See* M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 15.11, p 348 (1986). Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension.

A lawyer's decision to represent a client and file a case cannot reasonably be based upon the assumption that he or she will be entitled to the same rates of compensation for the life of the case. Indeed, given that fees are only shifted if the plaintiff wins, that fee awards generally take into account changes in market rates over time, and that courts routinely

apply the statutory law in effect at the time of decision to attorney fees, *Landgraf*, 511 U.S. at 264 (citing *Bradley*, 416 U.S. at 711), a lawyer's expectation is precisely the opposite.

In *Hutto v. Finney, supra*, 437 U.S. 678 and *Bradley v. Richmond School Board, supra*, 416 U.S. 696, this Court applied to pending cases attorney's fee statutes favorable to plaintiffs. In addition, for the past 20 years Respondents in the present cases have benefited from a constantly increasing "prevailing rate" of fees. Now Congress has acted to impose a limit on fees which would otherwise be awardable in this type of case but there is no reason not to apply this restriction in pending cases. Applying the PLRA's attorney fee limitations to all awards made after April 26, 1996 does not have an impermissible retroactive effect because the determination of attorney fee awards, which are collateral to the main cause of action, does not attach new legal consequences to completed events. Applying the PLRA fee limitations to Respondents will not "impair rights possessed when [they] acted, increase liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Limiting prisoners' attorney fees to 150 percent of the amount allowed for court-appointed counsel is not "so fundamentally unfair as to result in manifest injustice." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (instructing that section 1988 was "never intended to produce windfalls to attorneys"); *see also, Id.* at 122 (stating that section 1988 "is not a relief Act for lawyers").

The Court of Appeals decision is simply not a reasonable construction of a statute that was intended in part to lower the costs to states of prison litigation.

CONCLUSION

For all these reasons, Petitioners respectfully urge this Court to reverse the Court of Appeals and hold PLRA section 803(d) applicable to all awards of attorney's fees made after the effective date of the Act, regardless when the services were rendered.

Respectfully submitted,

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December, 1998

(6)

No. 98-262

In The

Supreme Court of the United States

October Term, 1998

BILL MARTIN, et al.,

Petitioners,

v.

EVERETT HADIX, et al.,

Respondents.

and

BILL MARTIN, et al.,

Petitioners,

v.

MARY GLOVER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PARTIES TO THE PROCEEDING

Martin v. Hadix:

Petitioners, Bill Martin is Director of the MDOC; Dan Bolden is Deputy Director for the Bureau of Correctional Facilities; Denise Quarles is the Regional Administrator; Thomas G. Phillips; Bruce Curtis; Henry Grayson; and Barry McLeMore are Wardens at the SPSM facilities; Travis Jones; Harold White; David Jamrod; and Carmen Palmer are Deputy Wardens at the SPSM facilities. David Laurin; Fred Parker; Marilyn Ruben; and Mike Rankin are Business Managers. Marjorie VanOchten is Administrator for Office of Policy and Hearings.[1]

Respondents, Everett Hadix; Richard Mapes; Patrick C. Sommerville; Roosevelt Hudson, Jr.; Brent E. Koster; Lee A. McDonald; Darryl Sturges; Robert Flemster; William Lovett; James Covington; James Hadix; and several John Does, are persons who are or were confined in the custody of the Michigan Department of Corrections.

Martin v. Glover:

Petitioners, Bill Martin is Director of the MDOC; Griffin Rivers is Director of MDOC's Bureau of Programs; Dan Bolden is Director of MDOC's Bureau of Correctional Facilities; Lloyd Kimbrell is Director of MDOC's Bureau of Prison Industries; Robert Steinman is Director of

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[1] Bill Martin is the successor in office to Kenneth L. McGinnis and is substituted for him pursuant to Sup. Ct. R. 35.3

PARTIES TO THE PROCEEDING – Continued

MDOC's Bureau of Field Services; Joan Yukins is Warden of the Scott Correctional Facility; Sally Langley is Warden of the Florence Crane Correctional Facility.[2]

Respondents, Mary Glover; Lynda Gates; Jimmie Ann Brown; Manetta Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated are persons who are or were confined in the custody of the Michigan Department of Corrections.

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[2] Bill Martin is the successor in office to Kenneth L. McGinnis and is substituted for him pursuant to Sup. Ct. R. 35.3.

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STATEMENT OF THE CASE

The present cases are class action lawsuits involving male (Hadix) and female (Glover) prisoners under the jurisdiction of the Michigan Department of Corrections ("MDOC"). These cases were consolidated to address the applicability of the attorney's fees provisions of the Prison Litigation Reform Act of 1995 ("PLRA" or "Act"), Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), to services performed both prior to and subsequent to the passage of the Act. *Johnson v. Hadix*, Order granting writ of certiorari, 11/16/98, App. at 217a.

Both *Hadix* and *Glover* are pending cases in which the following acts occurred prior to the passage of the PLRA: 1) Judgments were entered placing the cases in a post-judgment remedial stage; 2) Plaintiffs were awarded fees as prevailing parties; 3) Court orders were entered establishing Plaintiffs' entitlement to attorney's fees at a prevailing market rate; 4) The parties stipulated to orders agreeing to Plaintiffs' entitlement to all reasonable post-judgment monitoring fees; and 5) Orders were entered establishing a specific prevailing market rate to be paid for post-judgment monitoring. The specific history and proceedings of the cases are detailed below.

A. *Glover v. Johnson*

The procedural history of the *Glover* case is detailed in *Glover v. Johnson*, 931 F. Supp. 1330, 1362-1363 (E.D. Mich. 1996), and is not repeated here except as it relates to the instant appeal.

In 1977, Respondents (hereinafter "Plaintiffs") filed an action seeking a declaratory judgment for violation of their rights under the Equal Protection Clause of the Fourteenth Amendment and their right of access to the courts. After a bench trial, the district court ruled that Petitioners (hereinafter "Defendants") had violated the Equal Protection Clause and failed to provide Plaintiffs meaningful access to the courts. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979). A "final order" was subsequently entered detailing the steps Defendants were to take to remedy these violations. *Glover v. Johnson*, 510 F. Supp. 1019, 1023 (E.D. Mich. 1981). Plaintiffs were thereafter found to be prevailing parties and awarded attorney's fees pursuant to 42 U.S.C. §1988. App. at 103a.

On November 12, 1985, the parties entered into a stipulated order entitling Plaintiffs to attorney's fees for post-judgment monitoring of the court's decrees and establishing a procedure for the submission of Plaintiffs' petitions for attorney's fees and costs, on a semi-annual basis, with the district court resolving any disputes as to the reasonableness of the fees or the appropriate market rate. App. at 125a.

During the 1980s, Defendants' failure to obey federal court orders resulted in findings of contempt and an order for Defendants to submit a remedial plan to cure Constitutional violations. *Glover v. Johnson*, 721 F. Supp. 808 (E.D. Mich. 1989), *aff'd*, 934 F.2d 703 (6th Cir. 1991). Throughout Plaintiffs' efforts to ensure compliance with federal court orders, the Sixth Circuit affirmed Plaintiffs' ongoing entitlement to attorney's fees at the prevailing market rate for post-judgment monitoring. *Glover v. Johnson*, 934 F.2d 703, 715-716 (1991).

In the course of monitoring Defendants' compliance, Plaintiffs submitted a fee petition for services performed between July 1, 1995, and December 31, 1995. While a motion to resolve objections to certain hours was pending, the Prison Litigation Reform Act was signed into law. Defendants argued that the Act applied to all attorney's fees for services performed prior to the Act's passage that had not yet been paid on the date of enactment. The district court ruled that the PLRA did not apply to an award of attorney's fees for legal services completed prior to the enactment of the PLRA, a decision which was affirmed by the Sixth Circuit. App. at 148a, *aff'd*, *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998), App. at 164a. Defendants sought no review of this opinion and have made payment without reservation for all pre-passage services at previously-established market rates.

Subsequently, Plaintiffs submitted a fee petition for the time period of January 1, 1996, through June 30, 1996. This petition included fees for time worked both pre- and post-passage of the PLRA. Ruling on Defendants' assertion that the Act should apply to hours worked both prior to and subsequent to the Act's passage, the district court reiterated its prior ruling that the PLRA's attorney's fee provisions do not apply to pre-enactment services but ruled that the Act did apply to services performed after the Act's enactment. Pet. App. at 33a. *See also* App. at 153a (opinion and order denying reconsideration and hearing on equal protection issue). The Sixth Circuit, in a consolidated appeal with a nearly identical opinion in *Hadix*, ruled that the fee limitations of the Act do not apply to these pending cases. *Hadix v. Johnson*, 143 F.3d

246 (6th Cir. 1998) (hereinafter "*Hadix/Glover*"), Pet. App. at 1a.

B. *Hadix v. Johnson*

This class action was filed under 42 U.S.C. §1983 in 1980 in the United States District Court for the Eastern District of Michigan by male prisoners incarcerated in the Central Complex of the State Prison of Southern Michigan, asserting that the condition of their confinement violated their First, Eighth and Fourteenth Amendment rights.

Five years later, the parties entered into a comprehensive consent decree designed to "assure the constitutionality of the conditions under which prisoners are incarcerated." The consent judgment addressed, *inter alia*, sanitation, safety, mental health, health care, medical, fire safety, overcrowding and protection from harm, access to courts, food service, management, and mail. *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998), App. at 96a.

On November 19, 1987, the district court entered an order establishing Plaintiffs' entitlement to attorney's fees for all reasonable post-judgment monitoring. App. at 79a. Thereafter, Plaintiffs submitted and were compensated for fees at the prevailing market rate on a bi-annual basis. A specific market rate was established in 1991 and affirmed by the Court of Appeals. *Hadix v. Johnson*, 65 F.3d 532 (6th Cir. 1995).

While the process established to complete the requirements of the consent judgment and bring finality to the case was proceeding, the PLRA became effective on

April 26, 1996. Defendants challenged Plaintiffs' entitlement to continued attorney's fees pursuant to the 1987 order, asserting the PLRA's fee provisions applied to limit both pre- and post-enactment services. In proceedings which parallel the events in *Glover*, the district court held that the PLRA's fee provisions did not apply to services performed prior to its enactment, a decision that was affirmed by the Sixth Circuit. App. at 91a, *aff'd*, *Hadix v. Johnson*, 144 F.3d 925, 946 (6th Cir. 1998), App. at 101a-102a (rejecting Defendants' argument that the PLRA's language provided that no award of fees could be entered after its passage as resulting in an impermissible retroactive effect). As in the *Glover* litigation, Defendants sought no review of this decision and paid, without reservation, all of Plaintiffs' attorney's fees for pre-passage services at the previously-established market rate.

Defendants subsequently challenged Plaintiffs' entitlement to post-enactment fees. In a ruling nearly identical to its *Glover* decision on the same issue, the district court ruled that the application of the fee provision to post-enactment services would not constitute a retroactive application of the statute. Pet. App. at 27a. This holding was reversed by the Sixth Circuit in the previously-referenced consolidated opinion. *Hadix/Glover*, 143 F.3d 246 (6th Cir. 1998), Pet. App. at 1a.

Defendants thereafter filed a petition for a writ of certiorari with this Court seeking to review only the question of whether the PLRA's provisions limiting attorney's fees apply to pending cases for services performed after the passage of the Act.

SUMMARY OF ARGUMENT

The strong presumption against retroactive legislation can only be overcome by an "unambiguous directive" or "express command" that the statute in question applies to pending cases. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). The text of the PLRA's attorney's fee provision, §803(d), contains no such directive.

Where a statute does not clearly and unambiguously indicate that it is intended to apply to pending cases, the Court is to use traditional rules of statutory construction to determine whether Congress intended the statute to be applied prospectively only. *Lindh v. Murphy*, 117 S.Ct. 2059, 2063 (1997). The use of explicit retroactive language in §802 of the Act and omission of similar language from §803, the section at issue in this case, along with the removal of the fee provision from §802 to §803 provides evidence that Congress intended these provisions to apply only to cases brought after passage of the Act. As such, there is no need for the Court to go further in its analysis, and the Act should not be applied to the present cases. *Lindh*, 117 S.Ct. at 2063.

Further, application of the attorney's fee provisions to pending cases would have a retroactive effect and therefore is prohibited under the traditional presumption against retroactivity. *Landgraf*, 511 U.S. at 280. If the attorney's fee provisions of the PLRA are applied to pending cases, attorneys who were induced to file such cases, relying upon the provision for the recovery of such fees under 42 U.S.C. §1988, will be compensated at below-market rates for hours reasonably spent litigating the cases. The Act also limits the amount of money plaintiffs

can recover in civil rights actions and reduces their compensation after they have already filed and, in some instances, won their cases. Such a result would have a retroactive effect and, as Congress did not make clear its intention to apply the fee provisions to pending cases, this Court should decline to give the statute retroactive effect and affirm the Court of Appeals' decision.

ARGUMENT

I. THE LANGUAGE OF THE PLRA'S ATTORNEY'S FEE PROVISIONS DOES NOT EXPRESS AN INTENT TO APPLY THESE SECTIONS RETROACTIVELY.

The first inquiry for determining whether a statute applies to pending cases is whether Congress, using clear, unambiguous language, has expressly prescribed the statute's proper reach. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994); *Lindh v. Murphy*, 117 S.Ct. 2059, 2062-63 (1997).[1]

In *Landgraf*, this Court considered whether §102 of the Civil Rights Act of 1991, authorizing compensatory and punitive damages in certain civil rights actions, applied to cases pending at the time of passage of the Act. The statutory provision at issue provided that "In an

[1] Demonstrating the rigor with which this Court enforces its "clear statement" rules, *Lindh* gave as an example of possible unambiguous intent the following language: "This Act shall apply to *all* proceedings pending on or commenced after the date of the enactment of the Act." *Lindh*, 117 S.Ct. at 2064 n.4, *citing Landgraf*, 511 U.S. at 260 (emphasis added by *Lindh* Court).

action brought by a complaining party under section 706 or 71 of the Civil Rights Act of 1964 . . . the complaining party may recover compensatory and punitive damages." This Court found that neither this language nor any other in the statute constituted the "express command," or "unambiguous directive" necessary to require the Act's application to a case pending at the time of its passage. *Landgraf*, 511 U.S. at 263, 280. Similarly the statutory language at issue in *Lindh*, which directed that "[a]n application for a writ of habeas corpus . . . shall not be granted," except as otherwise provided, 28 U.S.C. §2254(d), was found insufficiently clear to mandate the statute's application to pending cases. *Lindh*, 117 S.Ct. at 2063-64.

The section at issue in this case, like those in *Landgraf* and *Lindh*, lacks the "unambiguous directive" that it apply to pending cases. The PLRA's attorney's fee provision provides:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded except to the extent that . . .
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150% of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

PLRA §803(d)(d).

The language of §803(d) of the PLRA parallels the language in *Landgraf* and *Lindh*, directing that: "in any action brought . . . fees shall not be awarded" except as otherwise provided, and similarly fails to meet the requirement of an unambiguous expression of Congressional intent to apply the Act to pending cases. *Hadix/Glover*, Pet. App. at 10a (referencing the circuit court's prior opinion in *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998), App. at 202a).

The majority of courts to consider this issue have held that the statute's language does not demonstrate a sufficiently clear intent to apply the fee limitations of the PLRA to pending cases, evidencing a failure to meet the Court's requirement that the language be so clear as to "sustain only one interpretation." *Lindh*, 117 S.Ct. at 2064 n.4.[2]

To the extent that §803 manifests Congressional intent regarding its effective date, the language is forward-looking, intending to cover only cases "brought" after its effective date.[3] As was noted above, §803 states

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[2] *See, e.g., Blissett v. Casey*, 147 F.3d 218 (2nd Cir. 1998); *Hadix v. Johnson*, 144 F.3d 925 (6th Cir. 1998), App. at 96a; *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996). Two circuit courts of appeal have reached the opposite conclusion. *Madrid v. Gomez*, 150 F.3d 1030 (9th Cir. 1998), *reh'g pet. filed*; *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998).

[3] Defendants' argument that the word "brought" is a past-tense verb referring to cases "previously brought" is unpersuasive. Given the grammatical construction of §803(d), "brought" could just as easily be a past participle, which acts as an adjective, modifying the noun "action." *See Random House*

that "[i]n any action brought by a prisoner . . . " attorney's fees will be limited to 150% of the rate for court-appointed counsel. This language implies that the action to be "brought" – that is, filed – after the Act's effective date, April 26, 1998, in order to apply. *Cf. Landgraf*, 511 U.S. at 288 (" '[S]hall take effect upon enactment' is presumed to mean 'shall have prospective effect upon enactment' . . . ") (Scalia, J, Kennedy, J., and Thomas, J., concurring). If Congress had intended to cover pending cases, it would have had no reason to include the word "brought" in the section and could have merely stated that "in any action by a prisoner" such fee limits would apply.

Absent unequivocal language prescribing the temporal reach of the statute, and in the face of clear language in another section of this statute containing such language (§802(b)(1)) and the statute's legislative history (see Argument II, *infra*), the Sixth Circuit correctly found that the attorney's fee provisions set forth in §803(d) are inapplicable to cases pending on the date of the statute's enactment.

Unabridged Dictionary, 2d ed. (1993) at 267 ("brought (brôt), v. pt. and pp. of bring) and *Oxford English Dictionary*, 2d ed. (1989), vol. II at 590. The word in isolation is thus ambiguous because it could be intended to refer to "any action that was brought" or "any action that is brought," with significantly different results based on which was intended. As is discussed below, Plaintiffs contend that based upon the structure of the Act and its legislative history, the phrase as used in the PLRA is intended to cover only actions that are brought after the effective date of the statute.

II. BASED UPON THE STATUTORY CONSTRUCTION OF THE PLRA AND LEGISLATIVE HISTORY OF THE ACT, CONGRESS INTENDED THE ATTORNEY'S FEE PROVISIONS TO APPLY PROSPECTIVELY.

A. The Structure of the PLRA.

Absent express language specifying a statute's temporal reach, other rules of statutory construction may apply to remove even the possibility of retroactivity, irrespective of the existence of retroactive effect. *Lindh*, 117 S.Ct. at 2063. Applying the normal rules of statutory construction to the PLRA supports the conclusion that Congress intended the Act's fee limits apply only to cases filed after the passage of the Act.

In *Lindh*, the Court was asked to decide whether certain provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (hereinafter "AEDPA"), amending the federal habeas statute, applied to a habeas application that was pending at the time the new statute was enacted. Finding that the sections in question should not be applied to pending cases, the Court relied heavily upon the fact that chapter 154 of the AEDPA contained a section that expressly applied the chapter to pending cases, while the chapter under consideration in *Lindh*, chapter 153, did not. The Court noted:

> If, then, Congress was reasonably concerned to ensure that chapter 154 be applied to pending cases, it should have been just as concerned about chapter 153, unless it had the different intent that the latter chapter not be applied to the general run of pending cases.

> Nothing, indeed, but a different intent explains the different treatment.

Lindh, 117 S.Ct. at 2064.

A similar analysis applied to the PLRA requires the same conclusion. The attorney's fee provisions of the PLRA, amending 42 U.S.C. §1997e, are found in §803 of the Act. As Defendants acknowledge (Defendants' Brief at 14, 18), this section is silent as to its applicability to pending cases. In stark contrast, §802 of the Act, which addresses "appropriate remedies" in prison conditions litigation, explicitly provides that that section is to be applied to pending cases, stating:

> Section 3626 of Title 18 United States Code as amended by this Section [802] shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). This canon of statutory interpretation, referred to as *"expressio unius est exclusio alterius,"* must be applied unless there is clear evidence of a contrary legislative intent. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

In *Landgraf*, this Court articulated the presumption of non-retroactivity to "giv[e] legislators a predictable background rule against which to legislate." 511 U.S. at 273. Congress was no doubt aware of this "predictable background rule" when it enacted the PLRA, just two years later. In response to this clear statement from the Court, Congress chose to specify that §802 was applicable to pending cases while adding no such language to §803.

The absence of retroactivity language in §803 and the presence of such language in §802 thus triggers the presumption, which Defendants must rebut with clear evidence, that Congress intended the two sections to be treated differently with regard to their temporal application. Defendants' proffer of an alternate explanation for the disparate language in the two sections of the Act does not provide this clear evidence of contrary legislative intent. Defendants argue that the absence of retroactivity language in §803 is "easily explained" because there was "no compelling reason [for Congress] to specify that the law [would] apply to conduct – such as work to be done by lawyers in the future – which would occur only after the Act's effective date." (Defendants' Brief at 21.) Yet Defendants contend that §803(d) *does* affect conduct before its effective date by retroactively reducing the plaintiff's attorney's fees by, among other things, cutting the hourly rate for time worked *before* the passage of the Act. Defendants urge this Court to accept the analysis proffered by the Ninth and Fourth Circuits that the plain language of the Act requires a reduction of all fees awarded after the effective date of the act, including fees for services rendered prior to its passage. *See Madrid v.*

Gomez, 150 F.3d 1030 (9th Cir. 1998), *reh'g pet. filed*; *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998). (Defendants' Brief at 14-15.) Defendants state that it is not the timing of the work or conduct but rather the date of the judicial action in awarding the fee that is relevant. Under Defendants' interpretation, even if the court, as in both of the present cases, had already established by court order the prevailing market rate at which plaintiff's counsel would be paid, where the court's order for actual payment of fees occurred even one day after the passage of the Act, all of the plaintiff's attorney's fees would be reduced to the PLRA-imposed cap. One would have expected Congress to speak clearly had it intended to so affect pre-passage conduct.[4]

B. The Legislative History of the PLRA.

Congressional intent with regard to a statute's temporal application may also be determined by reference to the Act's legislative history. *See, e.g., Kaiser Aluminum and Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990); *Hutto v.*

[4] Moreover, the text of the statute is not consistent with a Congressional intent to apply the statute only to post-Act fees but not to pre-Act fees awarded after the Act's passage. "[A] court would have to find that Congress relied upon the same statutory language to convey an intent that the temporal reach of the statute is dependent upon the timing of the work, i.e., that it intended the fee provision to apply in pending cases for post-enactment fees but did not intend the provision to apply in pending cases for pre-enactment fees. We do not believe the statutory construction is capable of such a sophisticated construction; either the fee provision applies in pending cases or not." *Hadix/Glover*, Pet. App. at 11a.

Finney, 437 U.S. 678, 694 n.23 (1978). As in *Lindh*, the conclusion that §803 does not apply to pending cases, based on the inclusion of express language applying §802 to pending cases and the omission of this language in §803, is strengthened by the Act's legislative history. The attorney's fee restrictions were initially contained in what became §802 of the Act, which contained language making them applicable to pending cases, and were moved out of this section to what became §803, which contains no such language. While the *Lindh* Court found Congressional intent in favor of prospective application to exist solely with a side-by-side comparison of two sections of the statute, one containing express language and the other omitting the language, that conclusion is strengthened where one provision is moved from a section of an act containing express language mandating application to pending cases and placed in another section not containing such language. Moreover, when Congress moved the fee restrictions from §802 to §803, it added additional provisions which could only apply to future cases, further supporting the conclusion that the attorney's fee section as a whole was not intended to apply to pending cases.

What eventually became the PLRA was originally introduced as part of the Violent Criminal Incarceration Act of 1995. H.R. 667, 104th Cong., 1st Sess., 141 Cong. Rec. H691 (daily ed. Jan. 25, 1995). Title III of this Act was entitled the "Stop Turning Out Prisoners" (STOP) Act and was the predecessor to §802.[5] The STOP Act included a

[5] The "STOP" legislation was introduced in the Senate as S. 400. 104th Cong., 1st Sess., 141 Cong. Rec. S2649 (daily ed. Feb. 14, 1995).

limitation on attorney's fees that, as with the rest of the STOP provisions, was specifically directed at ongoing litigation and was expressly made applicable to pending cases.[6] Specifically, §301(b) provided that the changes in that title, including the attorney's fee limits, "shall apply with respect to all relief (as defined in such section) whether such relief was originally granted or approved before, on, or after the date of the enactment of this Act." Title II of H.R. 667 addressed Congress' concern with frivolous prisoner litigation and is the predecessor to §803 of the PLRA. Drafted as an amendment to the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 42 U.S.C. §1997d ("CRIPA"), the title II amendments contained neither an effective date nor a limitation on attorney's fees.

During the legislative process, the provisions limiting attorney's fees were deliberately moved from the STOP Act, amending 18 U.S.C. §3626, to the section amending CRIPA. This change occurred with the introduction of S. 1275. 104th Cong., 1st Sess., 141 Cong. Rec. S14317-18 (daily ed. Sept. 26, 1995). Senate bill 1275 continued to expressly apply the STOP Act provisions to pending cases. However, in S. 1275, the attorney's fee limitations

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[6] The STOP Act attorney's fees section stated: "No attorney's fees under section 722 of the Revised Statutes of the United States (42 U.S.C. 1988) may be granted to a Plaintiff in a civil action with respect to prison conditions except to the extent such fee is – (1) directly and reasonably incurred proving an actual violation of the plaintiff's Federal rights; and (2) proportionally related to the extent the plaintiff obtains court ordered relief for that violation." H.R. 667, §301(a)(f). The STOP Act's attorney's fee limits did not include a fee cap.

were moved from the STOP section, which was expressly applicable to pending cases, to the CRIPA section, which contained no effective date nor any statement of applicability to pending cases.

In addition to the fee limits originally included in the STOP legislation, S. 1275 added provisions referencing damages, attorney's fees, and retainer agreements. The attorney's fee provisions of S. 1275, §3(f), required that a portion of a plaintiff's monetary judgment be applied to the fee awarded against the defendant (§3(f)(2)), limited the amount of fees for which defendants were responsible to 125% of the monetary judgment (§3(f)(2)), and capped attorney's fees at 100% of the CJA rate (§3(f)(3)).[7] In addition, the statutory language of the fee limits was changed from that of H.R. 667 ("no attorney's fees . . . may be granted except . . . ") to language nearly identical to that found in the enacted statute ("in any action brought . . . such fees shall be awarded only if . . . ").

The day after the introduction of S. 1275, yet another prison litigation reform bill, S. 1279, was introduced. S. 1279, 104th Cong., 1st Sess., 141 Cong. Rec. S14414 (daily

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[7] Congress undoubtedly was aware that an attempt to apply the restrictions to reduce a previously-awarded judgment would have an impermissible retroactive effect. The bill further provided that it did not prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than that authorized in the subsection. (§3(f)(4)). Because such agreements would have to be made at the time representation began, this section of the bill fit with the other forward-looking subsections aimed at future cases. All of the fee limitations were made part of the CRIPA amendments of 42 U.S.C. §1997, leaving behind the retroactivity provision of 18 U.S.C. §3626.

ed. Sept. 27, 1995). This latter bill combined provisions of an earlier bill, S. 866, as well as the STOP legislation and S. 1275. 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (comments of Sen. Dole, sponsor of S. 1279). As in S. 1275, the STOP Act provisions were made expressly applicable to pending cases, and the CRIPA amendments were not. Moreover, as in S. 1275, S. 1279 placed the attorney's fee limits with the CRIPA amendments, where they remained in the bill that was finally enacted into law.

The removal of the attorney's fee provisions from the section that contained explicit retroactive language is strong evidence that Congress intended that pending cases would not be subject to the fee limitations. This principle was stated by the Court in *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), where, in finding a statute retroactive, the Court examined its legislative history and noted that an initial provision for prospective application was later stricken by the full Senate. *Id.* at 716 n.23. Given this legislative history, the *Bradley* Court stated that it was "reluctant specifically to read into the statute the very fee limitation that Congress eliminated." *Id. See also United States v. $814,254.76*, 51 F.3d 207, 212 (9th Cir. 1995) (explicit deletion of retroactivity provision is strong evidence that Congress intended only prospective application).

Defendants' argument that §§802 and 803 address different facets of Congress' intent to place limits on prisoner civil rights litigation does not weaken the applicability of the *Lindh* analysis to this statute.[8] Rather, as the Sixth Circuit

[8] Defendants cite to *Field v. Mans*, 516 U.S. 59 (1995), for the proposition that where statutory provisions are less closely related, the negative inference is "far weaker." (Defendants' Brief at 20-21.) Unlike the statute under review here, the sections of the Bankruptcy Code reviewed in *Field* developed independently over the course of 100 years. Moreover, as the *Field* Court noted, "[t]he more apparently deliberate the contrast [in two sections of a statute], the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects." *Id.* at 75 (citation omitted).

recognized, while both sections address what Congress perceived as excesses in the area of prison litigation, §802 addresses the mechanism for terminating longstanding cases such as the instant ones and contemplates resolving perceived excesses of the judiciary in post-judgment cases; it therefore logically contains express language of its applicability to such pending cases. *Hadix/Glover*, Pet. App. at 16a.

"In contrast, the CRIPA amendments [§803] are forward looking as they are aimed at curtailing the *filing* of frivolous lawsuits." *Hadix/Glover*, Pet. App. at 16a (emphasis in original). The placement of the attorney's fee provision in the section addressing primarily pre-filing issues evidences both Congressional recognition that attorney's fees under 42 U.S.C. §1988 are intended as a pre-filing inducement and that any intended deterrence to attorneys filing "frivolous" cases, by decreasing the potential recovery to substantially less than market rates, addresses future cases.[9]

[9] Defendants describe the purpose of the PLRA by quoting the statement of Senators Dole and Abraham in support of the Act's passage. (Defendants' Brief at 10.) In each instance, Defendants omit the portion of the quote which includes their goal of "dramatically reduc[ing]" or "limiting frivolous

The conclusion that the PLRA's fee provisions were intended to cover only future cases is confirmed by the statement of Sen. Abraham of Michigan, the sponsor of S. 1275. Upon introducing the bill, the first version of the PLRA to move the fee provisions to the CRIPA section, Sen. Abraham stated the purpose of the proposed attorney's fee provisions:

> Finally, the bill contains several measures to reduce frivolous inmate litigation. The bill limits attorney's fee awards . . .
>
> * * *
>
> And no longer will attorneys be allowed to charge very high fees for their time. The fee must be calculated at an hourly rate no higher than that set for court appointed counsel. And up to 25 percent of any monetary award the court orders the plaintiff wins will go toward payment of the prisoner's attorney's fees.

141 Cong. Rec. S14316 (daily ed. Sept. 26, 1995).[10]

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prisoner litigation." *See* 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (Sen. Dole) and S14316 (daily ed. Sept. 26, 1995) (Sen. Abraham), respectively. In fact, the comments of Sen. Dole cited by Defendants actually reference his discussion of the STOP Act provisions of the bill, §802, which were made applicable to pending cases, and not the CRIPA amendments, which included the attorney's fee limits.

[10] The only other CRIPA amendment in S. 1275 allowed for telephonic hearings in certain circumstances. In describing this provision, Sen. Abraham stated that it was also designed as a deterrent, "to keep prisoners from using lawsuits as an excuse to get out of jail for a time [to attend pretrial hearings]." 141 Cong. Rec. S14316 (daily ed. Sept. 26, 1995). Such language evinces an intent that all of the CRIPA amendments apply only to future cases.

Since, *ipso facto*, the PLRA's fee limits could not discourage the filing of *pending* cases, applying §803(d) only to cases brought after its passage would be the interpretation consistent with the section's stated purpose.[11] Moreover, the other, non-fee-related sections of §803(d) also relate to future cases. Section 803(d)(a), referring to administrative remedies, explicitly states, "No action shall be brought . . . ," clearly indicating that it applies only to future cases. *See Wright v. Morris*, 111 F.3d 414, 418 (6th Cir. 1997), *cert. den.*, 118 S.Ct. 263 (1998). Section 803(d)(c) concerns the dismissal of frivolous actions on the court's own motion, something that would apply only in new actions, given that a motion to dismiss is usually standard in any such case. Section 803(d)(f) concerns the telephonic hearings referenced above, and section 803(d)(g) allows defendants to waive the right to reply to an action without that action constituting an admission of any allegations in the complaint. Such a procedure is only needed in new cases, since in cases filed prior to the Act,

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[11] Defendants argue that the attorney's fee limits were not intended to discourage frivolous suits because fees are never awarded in frivolous suits but only if the Plaintiff prevails. (Defendants' Brief at 22.) Congress' use of the term "frivolous" was not synonymous with the judicial use of the term, as it evidently considered "frivolous" cases to include ones in which the plaintiff prevailed on a *de minimus* or "technical" issue. *See* H.R. Rep. 104-21 at 28 (1995), the Judiciary Report accompanying H.R. 667, which notes with regard to sub-section (f) covering attorney's fees, and specifically the proportionality requirement, that "[t]his proportionality requirement will discourage burdensome litigation of insubstantial claims where the prisoner can establish a technical violation of a federal right but he suffered no real harm from the violation."

the defendants would have generally filed a reply or other motion.

Also relevant to applying the traditional rules of statutory construction is the use of similar language in other attorney's fee statutes. Congress used language nearly identical to that of the PLRA when it passed the Handicapped Children's Protection Act (HCPA) of 1986, Pub. L. No. 99-372, 100 Stat. 796, authorizing attorney's fees "[in] any action or proceeding brought under this subsection." 20 U.S.C. §1415(e)(4)(B). However, because Congress wished this new section, enacted for the purpose of overturning a recent Supreme Court decision,[12] to apply not only to future cases but also to those pending at the time of passage, it added a section (HCPA §5) stating:

> The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984 [the day before the *Smith* decision was issued].

Because Congress used no such retroactive language in enacting the PLRA, it is clear that the attorney's fee

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[12] The fee provision of the Act overturned *Smith v. Robinson*, 468 U.S. 992 (1984), which had held that "the [Education of the Handicapped Act] was the exclusive avenue through which handicapped children could pursue claims against educational authorities and that attorney's fees were not recoverable in actions brought to secure EHA rights." *Counsel v. Dow*, 849 F.2d 731, 734 (2nd Cir. 1988), *cert. denied*, 488 U.S. 955 (1988).

limits here do not apply retroactively and that in using the phrase "in any action brought," Congress was referring solely to cases brought after the passage of the PLRA on April 26, 1996.

C. Application of §803(d) to Pending Cases Would Conflict with Other Sections of the Act.

To apply the PLRA fee provisions to all pending cases would sweep within the statute a class of plaintiffs – former prisoners – who were explicitly excluded at the time the Act was passed. Section 803 of the Act only covers claims by prisoners who are "confined to any jail, prison, or other correctional facility."

Many pending cases involve plaintiffs who have been released from prison subsequent to the initiation of suit. The Act does not state that it applies to "any action brought by a prisoner who *[was]* confined" to any jail, but rather uses the present tense to make clear a more limited scope. Indeed, the very definition of "prisoner" in §803 accentuates this point by providing that "prisoner" means "any person incarcerated or detained in any facility." PLRA §803(h). *See Kerr v. Puckett*, 138 F.3d 321 (7th Cir. 1998), finding that §803(e) does not apply to former prisoners. *See also Lafontant v. INS*, 135 F.3d 158 (D.C. Cir. 1998) (§804(a)(3) does not apply to former prisoners); *McGann v. Commissioner, SSA*, 96 F.3d 28 (2nd Cir. 1996) (same). Congress presumably had less interest in regulating the activities of former prisoners who have much less incentive to abuse the litigation system. *Kerr*, 138 F.3d at 323. Under Defendants' interpretation, the statute would apply retroactively not only to cases brought before its

effective date, but also to parties who at the time of enactment were outside the class to be regulated. This Court should not lightly construe a statute to apply to a class of parties who are explicitly excluded from the Act's coverage.

Where statutory "construction rules may apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as . . . the recognition of a negative implication would do here," the Court need not apply the judicial default rules traditionally employed in the second step of the *Landgraf* analysis. *Lindh*, 117 S.Ct. at 2063. As such, this Court should affirm the Court of Appeal's decision that the PLRA's attorney's fee limits are inapplicable to cases that were pending at the time the Act was passed.

III. APPLICATION OF THE PLRA'S ATTORNEY'S FEE PROVISIONS TO A CASE PENDING AT THE TIME OF PASSAGE OF THE ACT WOULD HAVE AN IMPERMISSIBLE RETROACTIVE EFFECT.

A. The Presumption Against Retroactive Application of a Statute.

"If [a] statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280.[13] This presumption against retroactivity is "deeply rooted" in our jurisprudence, reflecting that:

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[13] For the reasons detailed in Sections I and II, it must be concluded that such "clear congressional intent" is absent in this case.

> [e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Id. at 265 (internal footnote omitted).[14]

Describing circumstances that constitute an impermissible retroactive effect, this Court cited approvingly from Justice Story's definition, *see Society for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCDNH 1814) 28, stating:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retroactive.

Landgraf, 511 U.S. at 269.

However, these examples do not

> purport to define the outer limit of impermissible retroactivity. Rather [they] merely described that any such effect constitute[s] a *sufficient*,

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[14] The Court continued, 511 U.S. at 272, noting that

> [b]ecause it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.

> rather than a *necessary*, condition for invoking the presumption against retroactivity.

Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S.Ct. 1871, 1876 (1997) (emphasis in original).

In *United States v. Heth*, 7 U.S. (3 Cranch) 399 (1806), the Court was faced with a statute, similar to the one presently before the Court, that reduced the commission of certain customs inspectors from three percent to two and one-half percent. The question faced by the Court was whether this reduction applied to all commissions received after the effective date or whether, for goods imported prior to that date but for which the commissions were not paid until after, the previous rate of three percent should apply. In holding the statute inapplicable to what could be termed "pending imports," Johnson, J., noted:

> [W]here an individual has performed certain services, under the influence of a prospect of a certain emolument, that confidence which it is the interest of every government to cherish in the minds of her citizens, a confidence which experience leaves no room to distrust in our own, would lead to a conclusion, that it could not have been the intention of the legislature to defeat a reasonable expectation of her officer, suggested by her own laws. Unless, therefore, the words are too imperious to admit of a different construction, it will be gratifying to the court to be able to vindicate the justice of the government, by restricting the words of the law to a future operation.

Heth, 3 Cranch at 408 (Johnson, J.).

B. Application of the Presumption Against Retroactivity to the PLRA.

Consideration of the elements of notice, reliance and expectations of both prevailing plaintiffs in civil rights cases and their counsel lead to the conclusion that the application of the PLRA's fee provisions to cases filed prior to the Act's enactment would have an impermissible retroactive effect.

i. Congressional Intent Underlying §1988.

The very purpose of §1988 was to create an expectation on the part of plaintiffs' counsel of an award of reasonable attorney's fees in meritorious civil rights cases and thereby to induce attorneys to file meritorious cases on behalf of plaintiffs whose constitutional rights had been violated. *Kay v. Ehrler*, 499 U.S. 432, 436-37 (1991); *Evans v. Jeff D.*, 475 U.S. 717, 731 (1986). As the legislative history of §1988 makes clear, without access to attorney's fees at market rates, citizens – including prisoners – will have no effective way to vindicate their federal constitutional rights:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

* * *

"Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose . . . Without counsel fees the grant of Federal jurisdiction is but an empty gesture . . . " *Hall v. Cole*, 412 U.S. 1 (1973), *quoting*, 462 F.2d 777, 780-81 (2nd Cir. 1972).

The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven.

S. Rep. No. 94-1011, at 2-4 (1976), *reprinted in*, U.S. Cong. Code & Adm. News (1976) at 5910. *See also* H.R. Rep. No. 94-1558 at 1 (1976).

The purpose of a statute is central to an analysis of the retroactive effect of its amendment. It is the language of the original statute that Plaintiffs relied upon in pursuing a course of conduct that would be impermissibly burdened should the amendment be applied to pending litigation. In reliance upon the original statute, Plaintiffs initiated suit, and it is this event that is relevant for measuring expectations and retroactive effect.[15]

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[15] *Cf. Landgraf*, 511 U.S. at 292 (The purpose of a fee-authorizing statute is "to encourage suit for the vindication of certain rights – so that the retroactivity event is the filing of suit, whereafter encouragement is no longer needed. Or perhaps it is to *facilitate* suit – so that the retroactivity event is the termination of suit, whereafter facilitation can no longer be achieved.") (Scalia, J., Kennedy, J., and Thomas, J., concurring) (emphasis in original).

ii. Application of §803(d) to Pending Cases Would Have a Retroactive Effect on Counsel.

It is at the time of filing that plaintiffs and their counsel enter into agreement for costs and fees, specifying the respective obligations of the attorneys and clients, including the payment mechanism for the fulfillment of those obligations. It is at that time that plaintiffs and their counsel, relying upon the law providing for compensation at prevailing market rates should plaintiffs prevail, evaluate the case, the likelihood of success and the expectations of reimbursement at a reasonable rate should they prevail. It is at that time that plaintiffs and their counsel determine what type of claims to bring and what relief to seek, whether damages, injunctive relief, or both. And finally, it is at that time that plaintiffs' counsel commit themselves ethically to continued representation of their clients to ensure that the Constitution is honored, a course of conduct that cannot lightly be altered.[16]

The PLRA's attorney's fees limitation provide that even in successful cases the fees will be capped at below market rates and impose unanticipated consequences

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[16] Although Defendants urge the judicial act of awarding fees as the relevant moment to consider retroactive effect, the purpose of the statute is not to permit or forbid the exercise of judicial power. This is not a jurisdictional statute but rather a statute that affects a party's liability for attorney's fees and in this case provides that the Plaintiffs will now be liable for those fees, either directly or through a reduction of their damages. Additionally, addressing the judicial act of awarding fees fails to reach the effect of limiting fees for services performed prior to the Act's passage.

upon the attorney and client who initiated the litigation. Congress may have the authority to legislate such changes for cases filed in the future, when the parties can take such changes into account in making their decisions. However, changing them *after* a client and his or her attorney have, by filing suit, already relied on assurances of payment if the case is successful would cause precisely the type of "manifest injustice" that *Landgraf* and similar cases sought to prevent, particularly since §1988 was designed to induce precisely such reliance on the recovery of reasonable fees based on market rates.[17] *See Landgraf*, 511 U.S. at 282, finding that "the introduction of a right to compensatory damages [to a pending case] is also the type of legal change that would have an impact on private parties' planning" and as such would result in impermissible retroactive application of statutes.

If the attorney's fee provisions of the PLRA are applied to pending cases, attorneys who were induced to file cases on behalf of citizens whose constitutional rights were being violated and who relied upon the provision for recovery of attorney's fees will be compensated well

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[17] Such an application would also raise serious due process concerns, particularly given that the PLRA establishes such a potentially large period of retroactivity, *see, Eastern Enterprises v. Apfel*, 118 S.Ct. 2131, 2152 (1998) (O'Connor, J., Rehnquist, C.J, Scalia, J., and Thomas, J.); *id.* at 2159 (Kennedy, J., concurring), and that Congress appears to have "acted with an improper motive by targeting an unpopular group for special disability." *Cf. U.S. v. Carlton*, 512 U.S. 26, 32 (1994). *See also Romer v. Evans*, 517 U.S. 620, 632 (1996) (law "imposing a broad and undifferentiated disability on a single named group [is] an exceptional and . . . invalid form of legislation.")

below market rates for hours reasonably spent in successfully litigating the cases and ensuring compliance with the Constitution.[18] The reduction brought by the PLRA's restrictions would attach new legal consequences to events completed before the PLRA's enactment – the assumption of this representation for these Plaintiffs at the expense of handling other litigation – and take away rights acquired under then-existing laws and previous court orders in this case. *Accord Jensen v. Clarke*, 94 F.3d 1191, 1202-03 (8th Cir. 1996).

iii. Application of §803(d) to Pending Cases Would Have a Retroactive Effect on Plaintiffs.

Fee awards under §1988 are to be paid to plaintiffs, and not their counsel, for Congress bestowed "statutory eligibility" upon "prevailing parties" as opposed to their counsel. *Evans v. Jeff D.*, 475 U.S. 717, 730 (1986).

Application of §803(d) limits the amount that plaintiffs can recover in civil rights litigation and reduces the compensation that they may receive. Like imposition of a

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[18] The Act caps fees at 150% of the Criminal Justice Act's hourly rates. PLRA §803(d). However, CJA rates are based on the assumption that a lawyer gets paid for all hours worked, win or lose, while under the PLRA, the lawyer gets paid only for prevailing by litigated judgment and only for those hours deemed directly related to proving the violation.

statutory damages cap, the PLRA has a "retroactive effect" by diminishing the compensation available to successful plaintiffs.

The potential for "[r]etroactive modification of damages remedies" to undermine expectations of the parties is "significant." *Landgraf*, 511 U.S. at 285 n.37. In *Landgraf* itself, this Court refused to apply an enactment retroactively which expanded a defendant's potential monetary liability. Plaintiff there filed suit in 1989 alleging sexual harassment and seeking the relief authorized by Title VII, which was limited to back pay and injunctive relief. While the case was on appeal, Congress passed the Civil Rights Act of 1991, which added compensatory and punitive damages as an available remedy for certain kinds of discrimination. This Court concluded that application of the damages provision of the 1991 Act to pre-enactment conduct would have a retroactive effect, even though backpay was already available, because it would impose a new legal burden – liability for damages – on past conduct. *Landgraf*, 511 U.S. at 282-83.

Fee shifting constitutes a remedy, albeit one that recoups litigation expense as opposed to the harm inflicted by defendants' unlawful action. "Congress enacted the fee-shifting provision as an 'integral part of the remedies' " under the civil rights laws. *Evans v. Jeff D.*, 475 U.S. at 731 (citation omitted). The amendment at issue, which alters an essential component of the fee-shifting provision by limiting attorney's fees, of necessity shifts the liability for these fees from defendants to plaintiffs. As this Court has stated, "[t]he extent of a party's liability, in the civil context as in the criminal, is an

important legal consequence that cannot be ignored." *Landgraf*, 511 U.S. at 283-84.[19]

iv. Courts Have Held Statutes Limiting Attorney's Fees Inapplicable to Pending Cases.

Consistent with the principles of *Heth* and *Landgraf*, lower courts have declined to apply statutes that limit attorney's fees in pending cases, finding them impermissibly retroactive. In *Watson v. Secretary of Health, Education and Welfare*, 562 F.2d 386 (6th Cir. 1977), the court applied the presumption against retroactive application to a statute and federal regulation limiting attorney's fees. At issue in *Watson* was Congress' 1972 amendment to the Federal Coal Mine Health and Safety Act of 1969. The amendment, which specified no effective date, authorized the Secretary of Health, Education and Welfare to

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[19] Defendants also argue that civil rights plaintiffs, at the commencement of litigation, have only a unilateral hope of fees and thus no legitimate expectation of recovery. (Defendants' Brief at 27.) First, Congress and the courts have made clear that if a plaintiff prevails in a suit covered by §1988, "fees should be awarded . . . unless special circumstances would render such an award unjust." *Kentucky v. Graham*, 473 U.S. 159, 164 (1985) (citation omitted). More importantly, parties have the very same expectation of recovering fees that they do of recovering damages or winning any other remedy. All remedies are uncertain at the time suit is filed; yet, as *Landgraf* makes clear, 511 U.S. at 284 n.36 and n.37, retroactive modification of damage remedies have "significant" potential for mischief and are often not applied to pending cases. Finally, in both of these cases, Plaintiffs had prevailed and established their entitlement to attorney's fees at prevailing market rates ten years before the passage of the PLRA.

limit availability of attorney's fees in administrative proceedings involving black lung claims. *Id.* at 388. The court held that the regulations could not be applied to claims that were pending on the regulations' effective date because such application would create a "disfavored retroactive effect." *Id.* at 389.[20]

Amendments limiting attorney's fees in the area of social security litigation have likewise been held inapplicable to pending cases where there has been an initial adjudication on the merits prior to the passage of the amendment. *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971); *Gardner v. Mitchell*, 391 F.2d 582 (5th Cir. 1968); *Ray v. Gardner*, 387 F.2d 162 (4th Cir. 1967); *Robinson v. Gardner*, 374 F.2d 949 (4th Cir. 1967). In addition, state courts have "consistently held that statutes changing or abolishing limits on the amount of damages available in wrongful-death actions should not, in the absence of clear legislative intent, apply to actions arising before their enactment." *Landgraf*, 511 U.S. 284 n.36 (citing cases).[21]

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[20] The Court did not differentiate between hours that attorneys worked on claims prior to the promulgation of regulation and hours worked following promulgation. Rather, the Court held that if a case were pending when the Secretary published the regulation, and if the attorney had already entered in a fee agreement, then the regulation could not be applied to any hours worked on the case. *Id.* 562 F.2d at 389.

[21] Defendants attempt to analogize the PLRA to cases seeking solely injunctive relief. (Defendants' Brief at 25.) But §803(d) is not limited to injunctive claims; rather, it applies to all prisoner civil rights actions, involving damages, injunctive relief, or both, filed after its effective date. In fact, the PLRA places additional limits on attorney's fees in damage cases. *See* PLRA §803(d)(d)(2). Additionally, the fee award cannot be

Defendants' reliance on *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), in support of their argument to apply fee limits to pending cases ignores the Court's rationale for its decision. The *Bradley* Court upheld the retroactive award of attorney's fees in part because, even in the absence of application of the new fee enactment, defendants in *Bradley* were subject to a similar fee award under equitable principles, and the district court had in fact awarded fees under that theory. Defendants' expectations – unlike those of Plaintiffs and their counsel in this case – were not disrupted by imposition of a fee award under the new statute. *Landgraf*, 511 U.S. at 277. Moreover, the Court noted that equitable concerns strongly supported retroactive application to alleviate the burden facing plaintiffs who successfully challenged racially discriminatory practices. *Id.* at 277-78. No such equitable concerns are present in this case because retroactive application would benefit those who have been found to be in *violation* of the Constitution. Finally, the Court noted that in passing the statute, Congress had deleted a provision calling for it to be applied only to services rendered after its enactment. The Court stated, "we are reluctant specifically to read into the statute the very fee limitation that Congress eliminated." *Id.* at 716 n.23.[22]

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analogized to an injunction that can be limited or modified by subsequent legislation. A fee award has no prospective effect but rather seeks to compensate plaintiffs for the costs of litigation needed to obtain redress. *Hutto v. Finney*, 437 U.S. 678, 695 n.24 (1978).

[22] Cases holding §1988 applicable retroactively are not contrary. The legislative history of §1988 expressly stated that the statute was intended "to apply to all cases pending on the

Perhaps more importantly, the Court in *Bradley* never addressed the question subsequently mandated by *Landgraf*: would application of the new attorney's fee provision have a retroactive effect? It is that effect on Plaintiffs and their counsel which makes retroactive application so inappropriate here.

v. Retroactive Application of the Fee Provisions Would Impose New Duties and Obligations on Plaintiffs and Their Counsel.

Defendants argue that attorney's fee statutes are "procedural" and that, under *Landgraf*, only substantive statutes are entitled to the presumption against retroactivity. (Defendants' Brief at 24.) Defendants misstate the law. *Landgraf* created no presumption in favor of retroactive application of any statute; rather, "the only 'presumption' mentioned in that opinion is a general presumption *against* retroactivity." *Hughes Aircraft*, 117 S.Ct. at 1878. While the *Landgraf* Court may have given "qualified" approval to applying certain procedural statutes to pending cases, *Lindh*, 117 S.Ct. at 2063-2064, "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Landgraf*, 511 U.S. at 275 n.29.

In this situation, the award of attorney's fees is more akin to a substantive provision, affecting the ability of plaintiffs to obtain and retain counsel to vindicate their

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date of enactment." H.R. Rep. No. 94-1558, at 4 n.6 (1976), *cited in Hutto v. Finney*, 437 U.S. 678, 694 n.23 (1978).

constitutional rights, than a procedural provision governing the doctrine of *forum non conveniens* or the standards for joint trials of co-defendants.[23] *Accord, Hughes Aircraft*, 117 S.Ct. at 1878, finding that statute, though phrased in " 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other" where the statute affects substantive rights of parties. Further, Defendants' characterization of entitlement to attorney's fees and damages as procedural is misplaced:

> [H]olding a person liable for attorney's fees effects a "substantive right" no less than holding him liable for compensating as punitive damages which the court treats as affecting a vested right.

Landgraf, 511 U.S. at 292 (concurring opinion).[24]

The lessened concern that courts express with regard to the retroactive effect of procedural statutes stems in part from the presumed neutrality of statutes which alter the process and modes of practice in litigation. Unlike the

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[23] In addition, this Court has noted the "logical morass of distinguishing between substantive and procedural rules." *Mistretta v. U.S.*, 488 U.S. 361, 392 (1989); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

[24] Defendants argue (Brief at 20) that the provisions are procedural and prospective as they "have no effect on the substantive judgments or awards already entered." The issue is not whether the statute affects prior judgments or awards but rather whether it alters the legal status or imposes new burdens or disability on conduct performed prior to the new law. Even under Defendants' analysis, it must be recognized that the Act affects the judgments of the district court and circuit court that Plaintiffs are entitled to all reasonable attorney's fees at market rate for their post-judgment monitoring.

instant case, procedural changes typically are not regarded as suspect for impairing parties' rights to their detriment as they usually involve "diminished reliance interests" by the parties. *Landgraf*, 511 U.S. at 275.

In affecting the ability of plaintiffs to retain their attorneys and the ability of these attorneys to continue to fulfill their ethical and contractual obligations, the statute affects more than "procedural" rights. A retroactive application would single out and burden this group of civil rights attorneys and plaintiffs who previously filed meritorious claims to eliminate constitutional violations in their state's prisons.

While the Court need not reach the question of whether Congress' singling out one unpopular group – prisoners – and specifically diminishing the incentive of attorneys to represent them constitutes an equal protection violation, similar concerns arise with a retroactive application of this section of the PLRA.[25]

The changes in the fee provisions of §803(d) impact solely the duties, rights and reliance of plaintiffs in such a way as to raise the concern that applying this statute retroactively is a "means of retribution against an unpopular group." *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998) (Kennedy, J., concurring), *citing Landgraf*, 511 U.S. at 266.

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[25] While the district court was compelled to address Plaintiffs' equal protection claim (App. At 153a-156a), the Court of Appeals did not need to reach this question, finding the statute inapplicable to pending cases. Pet. App. at 7a n.1.

The impact of the statute on those attorneys who accepted and pursued cases with the promise of adequate compensation if they prevailed is exacerbated by the reality that that decision is for all practical purposes now irrevocable, imposing clearly unanticipated burdens and duties. Aside from ethical considerations,[26] it is unlikely that any private counsel could be found to substitute under either the terms of the current PLRA or the specter of possible future reductions should the Act be deemed applicable to pending cases.

Further, in another part of the omnibus spending bill that included the PLRA, Congress removed an alternate source of representation by prohibiting any legal services organization receiving federal funds from "participat[ing] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison." Pub. L. 104-134 (1996), §504(a)(15). When combined, these two pieces of legislation serve to greatly restrict the ability of prisoners to find counsel to represent them, even if they have meritorious claims. In fact, the district court found that the fee cap will make it financially impossible for most private attorneys to accept the vast majority of cases where prison officials have violated inmates' constitutional rights – even if the claim is well-documented, liability is clear, and the violation is egregious. App. at 153a, 154a-156a. The absence of counsel is likely to be fatal

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[26] Plaintiffs' counsel could not ethically discontinue their representation despite the potential financial hardship. *Mallard v. United States Dist. Court for the Southern Dist. of Iowa*, 490 U.S. 296, 316 (1989) (Stevens, J., Marshall, J. Blackmun, J., and O'Connor, J., dissenting).

even to meritorious claims. *See Turner, When Prisoners Sue: A Study of Section 1983 Suits in the Federal Courts*, 92 Harv.L.Rev. 610, 624 (1979) ("In those few cases in which the prisoner was represented by counsel, this fact made a decisive difference.").

"In some cases, . . . the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive adjudication" *Landgraf*, 511 U.S. at 267 n.21. Where, as here, there exist questions concerning the constitutionality of legislation,[27] this Court has held that courts should "first ascertain whether a construction of the statute is fairly possible by which the [constitutional] questions may be avoided." *Johnson v. Robinson*, 415 U.S. 361 (1974), *quoting United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971). Finding that the attorney's fee limits apply only to cases filed after passage of the Act not only avoids having to decide these

[27] In addition to the due process concerns noted above, the attorney's fee provisions raise important equal protection concerns. In response to the latter, two rationales have been posited for Congress' singling-out of prisoners for decreased attorney's fees: deterring frivolous lawsuits and the desire of Congress saving the states money. Neither is supported by capping incarcerated Plaintiffs attorney's fees below the prevailing market rate rather than capping all such fees. "To fasten a financial burden only upon those . . . who are confined in state institutions . . . is to make an invidious discrimination." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). As the *Romer* court noted, 517 U.S. at 633-34 (citations omitted), "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense . . . The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws.' "

unnecessary constitutional issues but is consistent with Congress' stated purpose in adopting the provision.

CONCLUSION

For the foregoing reasons, Plaintiffs/Respondents respectfully request that this Court affirm the decision of the Court of Appeals for the Sixth Circuit and find that the attorney's fee limits of §803(d) of the PLRA are inapplicable to cases pending on the date of the statute's enactment.

Respectfully submitted,

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(8)

No. 98-262
In the Supreme Court of the United States
October Term, 1998

BILL MARTIN, et al.,

Petitioners,

v.

EVERETT HADIX, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Petitioners rely on their previously-filed brief for the statement of the questions presented for review, the list of parties, citations of opinions and orders below, the statement of jurisdiction, the statutes involved, and the statement of the case. Rule 24.2.

ARGUMENT

This supplemental brief is submitted pursuant to Rule 25.5 to inform the Court of a development occurring in the case after the filing of the parties' brief on the merits.

The issues in the present case deal with attorneys fees, but the underlying cases have continued. In one of the two present consolidated cases, *Martin v. Glover*, the underlying issue is whether the educational, vocational, apprenticeship and work-pass opportunities provided to female inmates are sufficiently comparable to the opportunities provided to male inmates to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment. In an earlier opinion, *Glover v. Johnson*, 138 F. 3d 229 (6th Cir, 1998), App. 164a, the Court of Appeals remanded this aspect of the case to the District Court to conduct hearings and receive evidence, App. 188a:

> Within 120 days following issuance of this opinion, the district court shall conduct hearings and receive evidence, including stipulations by the parties, in order to determine with particularity the educational, vocational, apprenticeship, and work-pass opportunities presently being provided (1) to male inmates and (2) to female inmates in the Michigan correctional system. The district court will then make particularized findings of fact and conclusions of law determining whether the male and female inmates are presently being provided sufficiently comparable education, vocational, apprenticeship, and work-pass opportunities as to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment.

Hearings were held and on February 22, 1999, the District Court entered its opinion finding that the opportunities for female and male inmates are sufficiently comparable to satisfy constitutional requirements and the Court therefore granted the Petitioner's motion to terminate the Court's jurisdiction. The opinion is attached to this brief as a supplemental appendix. Supp. App. 1a.

When it ordered the remand, the Court of Appeals retained jurisdiction of that aspect of the case, App. 189a, so the issue is still pending there. Even though the underlying substantive merits of the case now appear to be approaching finality, the District Court's opinion, and any further substantive ruling on this aspect of the case by the Court of Appeals do not not make the issues in the present proceeding moot, *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994):

> Attorney's fee determinations, we have observed, are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Employment Security*, 455 US 445, 451-452, 71 L Ed 2d 325, 102 S Ct 1162 (1982). See also *Hutto v. Finney*, 437 US 678, 695, n 24, 57 L Ed 2d 522, 98 S Ct 2565 (1978).

Therefore, despite the District Court"s determination that there is no longer a constitutional violation, this Court should resolve the attorney's fee issues in the present cases.

CONCLUSION

For these reasons, and for the reasons set forth in their brief on the merits, Petitioners respectfully urge this Court to reverse the Court of Appeals and hold PLRA section 803(d) applicable to all awards of attorney's fees made after the effective date of the Act, regardless when the services were rendered.

Respectfully submitted,

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March, 1999

APPENDIX

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United States District Court Opinion
dated Feb. 19, 1999.....1a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARY GLOVER, et al.,

Plaintiffs, CASE NO. 77-CV-71229
HON. JOHN FEIKENS

v

PERRY JOHNSON, et al.,

Defendants.

OPINION

Introduction

I have before me on remand the task to revisit the underlying constitutional issues of this complex prison reform case twenty years after my unappealed judgment against defendants on those same issues in Glover v. Johnson, 478 F. Supp. 1075, 1077 (E.D. Mich. 1979). The procedural explanation for how the case has, in a sense, come to be reborn begins in December 1993, when defendants filed a motion to terminate my continuing jurisdiction pursuant to Fed. R. Civ. P. 60(b)(5) or, alternatively, Fed. R. Civ. P. 60(b)(6).[1] In Glover v. Johnson, 879 F. Supp. 752 (E.D. Mich. 1995), I denied that motion, concluding that defendants still had not substantially complied with my remedial orders and plans.

[1] Fed. R. Civ. P. 60(b)(5) and (6) reads in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:...(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

See id. at 759-60. On appeal, the U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") vacated my denial and defined the bounds of my task:

> To restate the matter for purposes of emphasis, the federal court's authority - the district court's and this court's to intrude itself into the operation of Michigan's prison system is limited to assuring (1) that *sufficient parity* is achieved between male and female inmates in matters of educational and vocational opportunities as satisfies the demands of the Equal Protection Clause of the Fourteenth Amendment, and (2) that female inmates have the level of access to the courts that is constitutionally required under the First Amendment.

Glover v. Johnson, 138 F.3d 229, 242 (6th Cir. 1998) (emphasis added).

I addressed the concept of parity under the Equal Protection Clause in my original opinion in this case. See Glover, 478 F. Supp. at 1079. There I wrote:

> The term "parity of treatment" describes concisely the standard to which, I believe, the State ought to be held in its treatment of female prisoners. In other words, Defendants here are bound to provide women inmates with treatment and facilities that are substantially equivalent to those provided the men - equivalent in substance if not in form - unless their actions, though failing to do so, nonetheless bear a fair and substantial relationship to achievement of the State's correctional objectives.

Id. The Sixth Circuit referred to this passage in its remand opinion, stating that I had "correctly identified the remedial goal to be achieved in this litigation - *parity in the treatment of male and female prisoners.*" Glover, 138 F.3d at 241 (emphasis in original). The court then carefully outlined how I should pursue this goal:

> [T]he district court shall conduct hearings and receive evidence, including stipulations by the parties, in order to determine with particularity the educational, vocational, apprenticeship, and work-pass opportunities presently being provided (1) to *male* inmates and (2) to *female* inmates in the Michigan correctional system. The district court will then make particularized findings of fact and conclusions of law determining whether the male and female inmates are presently being provided sufficiently comparable education, vocational, apprenticeship, and work-pass opportunities as to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment.

Id. at 243 (emphasis in original).

Finally, the court directed:

> In undertaking this task, the district court must take into account the present conditions of custody and population size at various institutions; any differences in educational and vocational interests between male and female inmates; available educational and vocational training resources; and such other considerations as the district court may deem appropriate.

Id.

To restate the focus of my task, it is this: to determine whether sufficient parity of treatment under the Equal Protection Clause of the Fourteenth Amendment has *presently* been achieved between male and female inmates in the Michigan prison system in the matters of educational, vocational, apprenticeship, and work-pass opportunities.[2] The scope of my task no longer includes consideration of the First Amendment right to access issue because the parties have

[2] I emphasize the distinction the Sixth Circuit has drawn in defining my task. By requiring me to evaluate the present conditions of parity, the Sixth Circuit has implicitly asked me to measure the results of defendants' remedial efforts against the standard of parity that the Equal Protection Clause *presently* requires. With this task, therefore, I am not reconsidering the issue of constitutional liability adjudicated in 1979.

recently agreed to settle that issue based on the Sixth Circuit's resolution of the Knop v. Johnson and Hadix v. Johnson appeals, as well as Chief Judge Richard A. Enslen's unappealed rulings and orders in those cases.[3]

Before I turn to the merits of the parity issue, I must delineate the standard of review that the Equal Protection Clause demands in the prison setting.[4]

I. Prisons and Equal Protection

At the time of my original opinion, the inmate plaintiffs' claim of facial gender discrimination in violation of the Equal Protection Clause was novel. So much so, in fact, that my research uncovered only one case, an unpublished district court opinion, that dealt with facial gender classifications in the prison setting. See Glover, 478 F. Supp. at 1078-79 (quoting from Barefield v. Leach, No. 10282 (D.N.M. 1974)). The Supreme Court had not spoken in any way on the issue of equal protection in a prison setting, although it had written on the deferential considerations a federal court must address whenever it applies constitutional law to prisons. See e.g., Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 125(1977) (noting that judicial branch must give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement"). Given that there was no case law in 1979 indicating that I should treat female prisoners differently than any other plaintiff alleging facial discrimination on the basis of gender, I chose to apply the heightened scrutiny standard of review first developed in Craig v. Boren, 429 U.S. 190 (1976), to the plaintiffs' equal

[3] The appeals before the Sixth Circuit are Nos. 96-2387, 96-2397, 98-2391, and 99-1007. The first two are pending and concern Chief Judge Enslen's order of October 1, 1996. The parties have, in effect, agreed to adopt for the female facilities whatever legal access remedy the Sixth Circuit and Chief Judge Enslen (through his unappealed rulings) find to be suitable for the male facilities. (See Def.s' Proposed Findings of Fact and Conclusions of Law at 50-52; Pl.s' Amended Findings of Fact and Conclusions of Law at 2, n.1.)

[4] I find it unnecessary to repeat the extensive history of this case. My findings in this opinion are the result of the record developed through an eight day evidentiary hearing that began on January 11, 1999 and eventually ended on February 9, 1999.

protection claim. See Glover, 478 F. Supp. at 1078 (quoting Craig standard).

After the passage of almost two decades, however, new case law and the hard lessons of this case raise a question as to whether a different standard of review should be applied to equal protection cases in a prison setting. The Supreme Court again addressed the issue of deference to legitimate institutional needs in the operations of state prisons. As the Court reasoned in Rhodes v. Chapman, 452 U.S. 337 (1981):

> [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Id. at 351, n.16 (quoting Procunier v. Martinez, 416 U.S. 396,404-05 (1974)). The now well- established policy of judicial deference springs from the related principles of institutional competence, federalism, and separation of powers. See Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of prisons"); Bell v. Wolfish, 441 U.S. 520, 548 (1979) ("the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial").

In Turner v. Safley, 482 U.S. 78 (1987), the Supreme Court hardened the policy of judicial deference into a reasonableness standard of review for prisoners' constitutional claims. The plaintiff prisoner class in Turner had challenged the constitutionality of a regulation restricting correspondence between inmates and a regulation limiting the inmates' ability

to marry. See id. at 81-82. In evaluating plaintiffs' claims, the Court defined its task as having "to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." Id. at 85 (quoting Procunier, 416 U.S. at 406). The Court held that:

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators..., and not the courts, [are] to make the difficult judgments concerning institutional operations."

Id. at 89 (quoting Jones, 433 U.S. at 128). The Court justified its holding by reference to those same principles of institutional competence, federalism, and separation of powers that have become necessarily commonplace in constitutional litigation involving prisons. As the Court explained:

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

Id. (quoting Procunier, 416 U.S. at 407). Through Turner, then, the Supreme Court has altered the general constitutional approach in the prison context in order to fashion a more satisfactory balance between the legitimate institutional needs of state prisons and the overarching demands of the

Constitution. The Court's recent use of Turner to reverse a district court's remedial order for intrusiveness demonstrates how this new balance applies in prison administration. See Lewis v. Casey, 518 U.S. 343, 361-63 (1996).

Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989), is the only case that has addressed the issue whether Turner supplies the standard for equal protection claims alleging facial gender discrimination in the prison context. In Pitts the court held that where gender discrimination is based on a facial classification, heightened scrutiny remains the appropriate standard of constitutional review, despite Turner. See id. at 1453-55. The court states two reasons for holding Turner inapplicable: first, the equal protection claim in Pitts challenged "general budgetary and policy choices made over decades," while Turner involved "regulations that govern the day-to-day operation of prisons," id. at 1453-54; and, second, facial gender discrimination remains "a classification that traditionally summons heightened scrutiny" under the Equal Protection Clause id at 1454.

I find the first reason offered in Pitts unpersuasive because it reads Turner too narrowly. While Turner does focus predominantly on regulations, and not on policy, the deferential concerns of Turner nevertheless encompass both administrative policy and regulations. I read Turner to govern, at minimum, judicial review of any prison administrative decision, whether a policy directive or security regulation, that has been challenged as an improper restriction on a prisoner's constitutional protections. I believe the Supreme Court's reliance on Turner in its Lewis decision reflects a similar understanding of Turner's scope. See Lewis, 518 U.S. at 361-63 (discussing how the district court "failed to accord adequate deference to the judgment of the prison authorities").

The second reason offered in Pitts also fails to persuade me. It is not a sufficient response to Turner to reason that heightened scrutiny should apply simply because that is what has traditionally been applied. This argument certainly did not save the basic First and Fourteenth Amendment constitutional rights at issue in Turner from evaluation under

the deferential standard of reasonable relation. Moreover, the Supreme Court framed the issue in Turner in general terms. The Court's description of that issue is worth repeating: "Our task...is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." Turner, 482 U.S. at 85. There is no qualification in the Court's statement when it speaks of "a standard of review for prisoners' constitutional claims." Id.

Although I recognize that Turner did not explicitly mandate a reasonableness test for gender-based classifications, I nevertheless find it to be dispositive on the issue of which standard of review is proper for this inquiry. Plaintiffs have offered the Supreme Court's recent clarification of the heightened scrutiny standard of review in United States v. Virginia, 518 U.S. 515, 533 (1996) (holding that state mandated single-sex schooling violated the Equal Protection Clause of the Fourteenth Amendment), as the proper case to apply. In most other situations of facial gender classifications, it would be. Yet, here, where I am faced with the daunting equal protection task of comparing the State of Michigan's male and female prison programming, a task that inherently requires me to examine the intricacies of administrative judgments made by prison officials, I find that the deferential concerns of Turner necessarily hold primary sway over the scope of my constitutional review. The reasonable relation test laid out in Turner therefore governs the parity inquiry.

In adopting this standard, I do not suggest that the inquiry will rework old ground. As the Sixth Circuit has recognized, my 1979 judgment on constitutional liability and the findings of law and fact that support it are the law of the case. See Glover, 138 F.3d at 254. What is before me now, then, is the necessity of making a judgment on the present parity of conditions, or lack thereof, between male and female inmate programming "as measured by the Equal Protection Clause of the Fourteenth Amendment...as authoritatively interpreted." Id. Inherent in this exercise is the application of constitutional doctrine as it presently stands. I conclude that an equal protection case involving gender-based classifications in a

prison setting cannot be evaluated today without using the reasonable relation standard of Turner. By applying Turner rather than Craig, I am not modifying my 1979 judgment on constitutional liability; rather, I am re-evaluating the constitutional adequacy of defendants' remedial efforts through the framework of an evolving constitutional doctrine.

My 1979 judgment has two further consequences for the equal protection analysis of this inquiry. First, this remains a case about the consequences of a *facial* gender classification drawn by the State of Michigan. In my original judgment, I found that plaintiffs' equal protection claim challenged the disparate effects of the State's facial gender classification on the educational, vocational, apprenticeship, and work-pass opportunities afforded the female inmates. See Glover, 478 F. Supp. at 1080. As defined by the Sixth Circuit, the present inquiry does not, and cannot, question this finding of facial discrimination because to do so would be to improperly reopen the unappealed liability judgment in this case.

Second, my finding that male and female inmates are similarly situated likewise remains binding. Recently, the U.S. Court of Appeals for the District of Columbia and the U.S. Court of Appeals for the Eighth Circuit have held that inmates segregated on the basis of gender are not similarly situated for purposes of the Equal Protection Clause. See Women Prisoners of D.C. Dep't of Corrections v. D.C., 93 F.3d 910, 924-27 (D.C. Cir. 1996), cert. denied __ US __, 117 S. Ct. 1552 (1997); Klinger v. Dep't of Corrections, 31 F.3d 727, 731-733 (8th Cir. 1994), cert. denied, 513 U.S. 1185 (1995). In contrast, I originally concluded that the State of Michigan treated similarly situated male and female inmates dissimilarly. See id. at 1077-78. While Women Prisoners and Klinger are instructive in that they demonstrate the new spirit of judicial deference in the prison context, they do not re-open my earlier liability determination that the male and female inmates in Michigan are similarly situated.

I turn now to my findings of fact and conclusions of law on the issue of parity of treatment.

II. Parity of Treatment

Because the Sixth Circuit restricted this parity inquiry to the present conditions of male and female educational, vocational, apprenticeship, and work-pass opportunities, I limited the parties' discovery to the conditions that existed during 1998. Counsel for plaintiffs has repeatedly objected to this limitation, asserting that it is unfair because it prevents plaintiffs from developing a full, historical analysis of defendants' remedial achievements. I rejected counsel's argument, however, because historical analysis is unnecessary to the inquiry before me. The Sixth Circuit has clearly mandated a present focus. See Glover, 138 F.3d at 254. My review of the *status quo* of male and female inmate programming does not depend on how conditions once were, but only on how conditions are now.

Before individually addressing the four programming areas at issue in this inquiry, I first make those factual findings that relate to the State of Michigan's prison system as a whole. As of October 31, 1998, the Michigan Department of Corrections ("MDOC") housed 40,506 inmates within thirty-nine major facilities and thirteen camp facilities.[5] (See Def.s' Ex. 2.) Of that total population, 38,701 were male and 1,806 were female. (See id.) The combined number of male inmates housed in the thirty-seven major male facilities was 35,824, while the combined number of female inmates housed in the two major female facilities was 1,394.[6] (See id.) The combined number of male inmates housed in the twelve male camp facilities was 2,877, while the number of female inmates housed in the lone female camp facility was 412. (See id.)

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5 This inmate population total does not include inmates assigned to the Huron Valley Center ("HVC") or the Reception and Guidance Center ("RGC"). (See Def.s' Proposed Findings of Fact and Conclusions of Law at 1, n.1.) HVC is an MDOC facility operated by the Michigan Department of Community Health. (See id.) Inmates housed at HVC receive mental health services. RGC inmates are males 21 years of age and older who are recent court commitments, administrative transfers, medical or psychiatric transfers, prison escapees, parole violators, or Residential and Electronic Programs' Trustees with new prison sentences. (See id.)

6 This population number does not include female inmates housed at the Scott Correctional Facility Reception and Guidance Center.

In addition to segregating inmates by gender, MDOC further classifies and segregates inmates by security risk. A Level I inmate presents the least risk, while a Level VI inmate presents the most. (See Test. of Special Administrator Nancy Zang ("Zang"), Tr., Vol.11 at 129- 31.) The full spectrum of possible security classifications is: I, II, III, IV, V, and VI. (See id.) There are no female inmates classified as either Level III or Level VI. (See id.) All male and female inmates housed in the camp facilities are classified as Level I. (See Def.s' Ex. 2.) Apparently, there are also special Level I facilities for male inmates that are known as "secure" Level I facilities; no such facility exists for the female inmates. (See Zang, Tr., Vol. II at 131.)

Based on the evidence contained in defendants' exhibit two, which was current as of October 31, 1998, the populations and security classification levels for each major male facility were:

FACILITY	(Abbr.)	POPULATION	SECURITY LEVEL
Adrian Temporary	ATF	957	Secure I
Alger Maximum	LMF	532	V
Baraga Maximum	AMF	592	V
Brooks	LRF	1,214	I,II,IV
Carson City Temp	OTF	956	II
Carson City Correctional	DRF	1,248	I, II, IV
Chippewa Temp	KTF	960	II
Chippewa Regional	URF	1,189	I, III, IV
Cotton Correctional	JCF	1,650	I, II, III, IV
Egeler Correctional	SMN	1,008	II
Gus Harrison	ARF	1,240	I,II, IV
Michigan Training Unit	MTU	1,307	II
Hiawatha Temporary	HTF	957	Secure I
Huron Valley Men's	HVM	477	IV
lonia Maximum	ICF	554	II,VI
lonia Temporary	ITF	959	Secure I
Kinross Correctional	KCF	1,218	II
Lakeland Correctional	LCF	1,195	Secure I, II
Macomb Correctional	MRF	1,240	I, II, IV
Marquette Branch Prison	MBP	1,116	I, V
Michigan Reformatory	RMI	1,256	I, IV
Mid-Michigan Temporary	STF	960	Secure I
Mound Correctional	NRF	1,055	II, IV

FACILITY	(Abbr.)	POPULATION	SECURITY LEVEL
Muskegon Correctional	MCF	1,292	III
Muskegon Temporary	MTF	956	Secure I
Newberry Correctional	NCF	921	II
Oaks Correctional	ECF	707	V
Riverside Correctional	RCF	767	IV
Ryan Regional	RRF	1,051	II, IV
Saginaw Correctional	SRF	1,239	I,II, IV
SPSM-Central Complex	SMI	176	IV
Parnall Correctional	SMT	1,444	I
Standish Maximum	SME	508	V
Thumb Correctional	TCF	854	II, IV
Western Wayne	WCF	746	III
Cooper Street	JCS	815	Secure I
Southern Michigan	JMF	610	IV

Also based on defendants' exhibit two, the populations for each male camp facility on October 31,1998 were:

CAMP	(Abbr.)	POPULATION
Brighton	CBI	214
Cusino	CCU	320
Koehler	CKO	239
Kitwen	CKT	238
Lehman	CLE	338
Manistique	CMQ	208
Ojibway	COJ	409
Ottawa	COT	238
Pellston	CPL	129
Pugsley	CPP	139
Sauble	CSA	150
Tuscola	CTU	255

The two major female facilities are Florence Crane ("Crane") and Scott Correctional ("Scott"). (See Def.s' Ex. 2.) On October 31, 1998, Crane housed 546 female inmates, all of which MDOC had classified as Level II security risks. (See id.) On the same date, Scott housed a total population of 848 female inmates, the individuals of which were assigned either Level I, II, IV, or V security classifications. (See id.) The one female camp facility is Camp Branch, which on October 31, 1998 housed a total population of 412 Level I female inmates.

(See id.)

Against this background, I first address whether the educational opportunities provided to the male and female inmates in the State of Michigan prison system are sufficiently comparable so as to satisfy the demands of the Equal Protection Clause.

A. Educational Opportunities

Beginning with the 1979 judgment, I have restricted the scope of this area to a narrow comparison of those post-secondary or college programming opportunities available to male and female inmates in the State's prison system. See Glover, 478 F. Supp. at 1083. The parties' evidence on educational opportunities that concerns or includes MDOC's present offerings of Adult Basic Education ("ABE"), English as a Second Language ("ESL"), General Education Development ("GED"), special education, and paralegal training is therefore irrelevant to my analysis in this area. Evidence on college paralegal training is further irrelevant because I have ruled that such evidence pertains to the First Amendment right to access issue that is no longer a disputed part of this proceeding. (See Tr., Vol.11 at 58-59.)

All male and female inmates may seek college education through correspondence courses undertaken at the inmate's expense pursuant to the requirements of MDOC Policy Directive 05.02.119. (See Def.s' Ex. 1E.) As noted in subsection EE of MDOC Policy Directive 05.02.112, college programming at State expense is not offered unless required by court order. (See Def.s' Ex. 1C.) Only three MDOC facilities provide college programming at State expense and all do so pursuant to my orders. Those facilities are the Egeler Correctional Facility ("SMN")[7] , a major male facility, and Scott and Crane, the only two major female facilities. (See Def.s' Ex.'s 3 & 4.)

[7] While the prison facilities at the Southern Michigan prison are in complete renovation, college programs, which were earlier offered there, are now offered only at Egeler. Section IV.H.2 of the Hadix Consent Decree required the MDOC to submit a plan providing for "meaningful out-of-cell activity" at the Southern Michigan prison. The plan submitted, and then approved by my order, provides for college programming for the male inmates housed at Southern Michigan.

MDOC permits all female inmates to participate in college programming at State expense if they meet certain basic and sensible MDOC eligibility requirements - for example, an inmate must verify that she has a GED or high school diploma - as well as the particular admission requirements of the college. (See Def.s' Ex. 1F.) Female inmates at the Camp Branch facility accordingly have the ability to transfer to the Crane facility if they wish to attend college programming at State expense. (See Zang, Tr., Vol.11 at 154-55 & 159-60.) In great contrast, male inmates not housed at SMN do not have the ability to transfer to SMN to enroll in the college programming offered there at State expense. (See id. at 154.)

As of October 31, 1998, 245 female inmates were enrolled in associate degree programming, and 120 female inmates were enrolled in baccalaureate degree programming. (See Def.s' Ex. 3.) Also on October 31, 142 male inmates at the Egeler facility were enrolled in associate degree programming, and 43 male inmates at the same facility were enrolled in baccalaureate degree programming. (See id.) These numbers result in a 20.210 % enrollment rate in college programming for the total female inmate population, and a 0.478 % enrollment rate in college programming for the total male inmate population.[8] Also noteworthy are MDOC budget expenditures on college programming for FY 1998; MDOC spent $392,544 on male inmate college programming during that period and $715,339 on female inmate college programming. (See Def.s' Ex. 6, Table VI.)

Another useful factor to consider are the number and types of degree programs offered. Male inmates at SMN can

[8] I came to the 20.210 % result by dividing the total number of female inmates enrolled in college programming (365) by the total population of female inmates (1,806). I came to the 0.478 % result by likewise dividing the total number of male inmates enrolled in college programming (185) by the total population of male inmates (38,701).

Defendants' enrollment rates differ from mine. For the total female inmate population, defendants calculated a 22 % rate. (~ Def.s' Proposed Findings of Fact and Conclusions of Law at 28.) For the total male inmate population, defendants calculated a 0.004 % rate. (~ -id.) Defendants' female rate appears to be inaccurate because defendants may have included paralegal enrollment numbers in their calculations. Defendants' male rate is the result of mathematical error.

presently choose to enroll in associate degree programs in Business Administration, Accounting, Business Data Processing, and Arts & Science, as well as in baccalaureate degree programs in Business Administration and Behavorial Sciences. (See Pl.s' Ex. 37.) As of October 31, 1998, male inmates were enrolled in all of these programs. (See-id.) Female inmates at Crane can presently enroll in certificate degree programs in Application Software and Applied Informations Systems, associate degree programs in Business Management and Liberal Arts, and a baccalaureate degree program in Applied Liberal Studies. (See id.) As of October 31, 1998, female inmates at Crane were only enrolled in the Liberal Arts and Applied Liberal Studies degree programs. (See id.) Female inmates at Scott can presently enroll in a certificate degree program in Information Processing Assistant, associate degree programs in Business Administration, Business Data Processing, Liberal Arts, and General Studies, and baccalaureate degree programs in Business Administration and Behavioral Sciences. (See id.) As of October 31, 1998, female inmates at Scott had enrolled in each program except Business Administration (associate), Applied Information Systems, Information Processing Assistant, and General Studies. (See id.)

Despite the weight of the evidence discussed, which demonstrates that the female inmates receive substantially equivalent educational opportunities to those afforded the male inmates, plaintiffs argue that the present body of evidence before me is insufficient for a ruling on parity in this area. (See Pl.s' Amended Findings of Fact and Conclusions of Law at 18-19.) Based on the testimony of their educational expert, Dr. Richard Meisler, plaintiffs contend that any worthwhile examination of educational parity must consider historical evidence regarding degree completion rates and progress, as well as evidence on the structure and coherence of degree programs. (See id; see also Test. of Dr. Richard Meisler ("Meisler"), Tr., Vol. II at 61-64.) I disagree. Plaintiffs essentially ask me to compare the quality of the degree programs offered to the male and female inmates. Absent allegations, however, that the MDOC intentionally offers "sham" courses, allegations rightly not made here, I do not believe I may pursue that line of inquiry in light of the deferential considerations of Turner, Lewis, and the Sixth

Circuit's mandate.

Additionally, the evidence on record is more than sufficient for a ruling. I have evidence on MDOC policy regarding access to degree programs, on the number and types of degree programs available, on enrollment numbers and rates, and on budgetary expenditures on college programming. Viewed in its totality, this evidence decisively indicates that female inmates presently have sufficiently comparable educational opportunities to those provided to male inmates; in other words, the State of Michigan's facial gender classification presently has no disparate effect on female inmates with respect to educational opportunities. I therefore conclude that sufficient parity of treatment under the Equal Protection Clause has presently been achieved by defendants in the matter of educational programming.

B. Vocational Opportunities

Plaintiffs' primary argument in this area is that the female inmates do not have a range of vocational opportunities substantially equivalent to that of the male inmates. (See Pl.s' Amended Findings of Fact and Conclusions of Law at 3-4.) Based on the expert report and testimony of Dr. Bruce Wolford, defendants contend, however, that when the female facilities are compared to "benchmark" male facilities of similar characteristics, parity in vocational opportunities is evident. (See Def.s' Ex. 6; see also Test. of Dr. Bruce Wolford ("Wolford"), Tr., Vol. VI at 8-10.)

According to MDOC records, seventeen vocational programs were available to male inmates as of October 31, 1998: print shop, optical technology, auto body repair, small engine repair, welding, electronics, building trades/restoration, building trades/theory, meat cutting, t.v. production, machine tool operation, business education technology, graphic arts/print shop, food service/management, horticulture, institutional maintenance, and auto mechanics. (See Def.s' Ex. 5.) Here are the seventeen vocational programs ranked by the number of times each is offered by a facility: institutional maintenance (25 facilities offer), horticulture (12), building trades/restoration (11), food service/management (10), business education technology (9), auto mechanics (4),

electronics (2), graphic arts/print shop (2), meat cutting (2), welding (2), auto body repair (1), building trades/theory (1), machine tool operation (1), optical technology (1), print shop (1), small engine repair (1), and t.v. production (1). (See lid.) As of October 31, 1998, thirty-two of the thirty-seven major male facilities offered at least one vocational program. (See id.) Most of the thirty-two facilities offered one to three programs each, and only seven of the thirty-two offered between four to six vocational programs each. (See id.) No male facility offered more than six vocational programs. (See id.) With regard to enrollment counts, 1,961 male inmates were enrolled in a vocational program as of October 31, 1998; this results in a 5.473% enrollment rate for the total population of male inmates in major facilities.[9] (See id.)

According to MDOC records, seven vocational programs were available to female inmates as of October 31, 1998: auto mechanics, building trades/restoration, business education technology, food service/management, graphic arts, horticulture, and institutional maintenance. See id.) The Crane facility offered four programs: business education technology, food service/management, graphic arts, and horticulture. See id.) The Scott facility offered six programs: auto mechanics, building trades/restoration, business education technology, institutional maintenance, food service/management, and graphic arts. (See id.) A male facility, Western Wayne, is the actual site of the auto mechanics and building trades/restoration programs offered to Scott inmates; inmates attending those two programs leave Scott during the time allotted for their instruction. (See id.; see also Zang, Tr., Vol I at 95-99.) With regard to enrollment

9 I calculated the 5.473 % rate by dividing the total number of male inmates enrolled in a vocational program (1,961) by the total number of male inmates in the major facilities (35,824). I used the major facilities population number because, regardless of gender, camp facilities in the State of Michigan prison system do not offer vocational programming. Male inmates in camp facilities cannot transfer to a major facility in order to enroll in vocational programming; thus, the total number of male inmates theoretically eligible for vocational programming must be lessened by the total number of male inmates in camp facilities. (See Zang, Tr., Vol. I at 152-53.)

Certainly my enrollment rate for the male inmates is a rough one. Some may be enrolled in more than one vocational program. If anything, then, my rate is likely to be high.

counts, 130 female inmates were enrolled in a vocational program as of October 31, 1998; this results in a 7.198 % enrollment rate for the total population of female inmates incarcerated by the State of Michigan.[10] (See Def.s' Ex. 5.)

Both parties, but especially plaintiffs, have urged me to include other programs within the arena of officially listed vocational programs. Defendants accordingly imply that I should recognize unlisted female programs in denture technology and pre-vocational computer lab training as vocational programs. (See Def.s' Proposed Findings of Fact and Conclusions of Law at 33.) Plaintiffs explicitly urge me to recognize the following male programs as vocational programs: power plant operations, barber training, substance abuse education, the bloodborne pathogens course, and the We Stand Sincere job seeking skills program. (See Pl.s' Amended Findings of Fact and Conclusions of Law at 6.) Whatever their merits, I will not consider any of these programs to be vocational programs for the purposes of this inquiry. Some quite clearly do not belong within the vocational category, while others have not been a part of the history of my previous deliberations in this case. Furthermore, it would be unfair to both parties to include, at this late date in the case, these few additional programs of uncertain existence.

Even with a few of these additional vocational programs thrown in the mix, I do not believe the central thrust of the evidence would be altered. Given the established vocational programs mentioned above, I find that the female inmates are provided a sufficiently comparable set of vocational opportunities to those provided to the male inmates. While the literal number of vocational programs offered varies, with

10 I calculated the 7.198 % rate by dividing the total number of female inmates enrolled in a vocational program (130) by the total number of female inmates incarcerated (1806). Unlike male inmates, female inmates who desire to enroll in vocational programming may be transferred out of the lone camp facility, Camp Branch, and into the Crane facility; thus, the total number of female inmates theoretically eligible for vocational programming is the same as the total number incarcerated. (See Def.'s Proposed Findings of Fact and Conclusions of Law at 42-44.)

Just as with the male enrollment rate, my calculation of 7.198 % is likely to be a rough proxy. Nevertheless, there is value in calculating these enrollment rates because a comparison demonstrates no substantial gap between the rates for men and women.

seventeen offered to the male inmates as a group and seven offered to the female inmates as a group, this crude fact alone cannot be dispositive. A more sophisticated comparison of male and female inmate programming reveals that the six most frequently offered male vocational programs institutional maintenance, horticulture, building trades/restoration, food service/management, business education technology, and auto mechanics - are also offered to all of the female inmates. These six are the programs most likely to be available to male inmates and also the ones that most of the enrolled male inmates attend. Thus, by also providing these core programs to the female inmates, the State has offered a range of vocational opportunities that is substantially the same.

Also indicative of the parity of treatment in vocational opportunities are the substantially similar enrollment rates for male and female inmates: 5.473 % and 7.198 % respectively. Although a comparison of these rates alone would be an incomplete measure of parity, the rates, in combination with the evidence of substantially similar core offerings, add significant weight to defendants' claims of parity. It is important to observe at this point that the Equal Protection Clause does not require identical treatment; thus, the mere fact that some of the flinge vocational programs are provided only to male inmates does not disturb well-established equal protection principles. Moreover, the failure to treat identically is mitigated by the fact that all female inmates who desire vocational training and meet MDOC eligibility requirements have access to vocational opportunities, whereas the same is not true for all male inmates who desire vocational training and meet MDOC eligibility requirements - those in camp facilities cannot transfer to a major facility for the purpose of enrolling in a vocational program. (See Zang, Tr., Vol. I at 152-153.)

Even if the literal difference in the present number of vocational programs offered to male and female inmates were to constitute dissimilar treatment under the Equal Protection Clause, that dissimilar treatment would nevertheless be permissible under the reasonable relation standard as articulated in Turner. As is implicit in the data on vocational programs in male facilities, legitimate and pragmatic penological interests, such as the need for security and

orderliness, necessitate an upper limit on the numbers of vocational programs that any one facility can support. No male facility offers more than six vocational programs. If the female inmates were to be provided all of the vocational programs currently provided the men, the Scott and Crane facilities would be asked to bear more programs than could reasonably be supported. Turner counsels me to respect the experienced judgment of prison administrators on this point.

A lesser argument for plaintiffs than their "comparable range" argument is the contention that the vocational programming available to the female inmates is not comparable in quality to the same programs offered the male inmates. (See Pl.s' Amended Findings of Fact and Conclusions of Law at 6-7.) As with the related argument in the college programming area, I have rejected this contention regarding quality in light of the guidance of the Sixth Circuit's remand opinion and the deferential considerations of Turner. There are no allegations of "sham" vocational programs. Turner requires me to presume that the MDOC is acting in good faith when it develops the content of a vocational program. I find I am not required to delve into detailed comparisons of curriculae, textbooks, equipment, and instructors in determining the parity issue before me.

Plaintiffs additionally raise three minor arguments against a finding of parity: 1) vocational programming is only available to female inmates on a part-time basis; 2) male inmates receive supplemental vocational programming through the On-the-Job-Training program ("OJT"); and 3) the MDOC places extra limitations on the participation of female inmates in vocational programming. (See id. at 8-10.) My duty under Turner to treat administrative decisionmaking with deference

dispenses with the first[11] and third[12] arguments. As to the second argument, the evidentiary record is unclear and, at most, suggests that a very small number of male facilities do provide OJT programs that may supplement core vocational programs. (See Pl.s' Ex. 7, noting that seven male facilities reported some OJT students.) Ms. Zang has testified that these OJT reports may be erroneous.[13] (See Zang, Tr., Vol. I at 130-34.) Given the uncertain nature of the OJT evidence and the small number of facilities reporting it, I find that the supplementary OJT programs, if they exist at all, do not alter the balance of the evidence, which weighs in favor of a finding of parity in vocational opportunities.

I conclude that sufficient parity of treatment under the Equal Protection Clause has presently been achieved by defendants in the matter of vocational programming. I emphasize that my holding does not rely on the conclusions of defendants' expert witness, Dr. Bruce Wolford, and his "benchmark" methodology, which compares male and female facilities of similar population, security level, and programming characteristics. That facility-by-facility method conflicts with the class-to-class comparison that is the essence

11 Ms. Zang has testified that most of the male inmate vocational programming is part- time and that full-time programming is a rarity. (See Tr., Vol.11 at 148-49.) Thus, the MDOC's decision to restrict female programming to part-time only does not appear to be a substantial disparity, especially one of constitutional dimensions in light of Turner.

12 Defendants fully admit to one set of extra limitations - stricter eligibility requirements for female inmates enrolling in the two programs held at the male Western Wayne facility - but note that they are necessary in order to maintain security while transporting the inmates to and from the Scott facility. (See Zang, Tr., Vol. I at 95-96.) Surely these security concerns qualify under Turner as legitimate penological interests that rightfully restrict constitutional protections.

Plaintiffs also contend that the following is a constitutionally improper "extra limitation": MDOC's requirement that Level I female inmates can only take vocational programming if they agree to be categorized as Level II security risks. (See id. at 89-90.) No such requirement exists for Level I male inmates. (See Def.s' Ex. 5.) Once again, however, I defer to the decision of the prison administrator as this particular limitation falls within the realm of legitimate security concerns protected by Turner.

13 At my request, Ms. Zang filed an affidavit with the Court on January 20,1999 regarding potential reporting errors in OJT counts, as well as in apprenticeship counts. (See Def.s' Proposed Findings of Fact and Conclusions of Law at 20-25, quoting full text of affidavit.) This affidavit was never admitted to the record and so it is not before me as evidence. As will become clear, the affidavit is, in the end, unnecessary to my rulings.

of equal protection analysis. Moreover, Dr. Wolford's expert opinion is not reliable because he has admitted in his expert report and under cross-examination that the MDOC essentially imposed the "benchmark" method upon him and, in fact, identified the "benchmark" facilities for him. (See Def.s' Ex. 6; see also Wolford, Tr., Vol. VI at 37.)

C. Apprenticeship Opportunities

The area of apprenticeship opportunities in this case has come to include not only traditional apprenticeship arrangements but also prison industries (often referred to as Michigan State Industries ("MSI")) and any OJT programs. As they did with vocational opportunities, plaintiffs argue that the female inmates' range of apprenticeship opportunities is not sufficiently comparable to that of the male inmates. Defendants, with the testimonial support of their apprenticeship expert, Michael J. Mahoney,[14] argue that the female inmates may actually have more apprenticeship opportunities than the male inmates.

Apprenticeships in Michigan's prison system fall under the regulatory oversight of the U.S. Department of Labor's Bureau of Apprenticeship and Training ("BAT"). (See Def.s' Ex. 1G; see also Test. of Michael J. Mahoney ("Mahoney"), Tr., Vol. V at 49.) Accordingly, MDOC Policy Directive 05.02.122 directs that the overall apprenticeship program "shall be conducted, operated, and administered in conformity with applicable provisions of the Rules and Regulations for the United States Department of Labor for apprenticeship program[s], 29 CFR Part 30, as amended." (Def.s' Ex. 1G.) Standards for apprenticeships must be registered with, and certified by, the BAT in order for the apprenticeship to be valid under federal law. (See id.) Under the present standards adopted by MDOC, an "apprenticeable occupation" must involve "manual, mechanical, and technical skills and knowledge clearly identified and commonly recognized throughout an industry" and must require "a minimum of 2,000 hours of on-the-job work experience." (Id.)

14 Mr. Mahoney also utilizes the controversial "benchmark" methodology I have rejected. (See Def.s' Ex. 7, report by Mahoney on apprenticeships, work-pass, and right to access issues.) Thus my ruling on parity in apprenticeship opportunities does not rely on his conclusions.

Evidence on apprenticeship opportunities is limited and, in some respects, questionable. The evidence on the record clearly establishes that, as of October 31,. 1998, male inmates had the opportunity to participate in the following twelve BAT-certified apprenticeships at the Marquette Branch Prison: arborist, carpenter, cook, electrician, farm worker, housekeeper, industrial maintenance, material coordinator, meat cutter, painter, plumber, and refrigeration. (See Def.s' Ex. 7, attachment 3; see also Pl.s' Amended Findings of Fact and Conclusions of Law at 11.) The evidence on the record also establishes that, as of October 31, 1998, female inmates at the Crane facility could participate in the following five BAT-certified apprenticeships: computer peripheral equipment operator, landscape gardener, building maintenance repair, maintenance electrician, and cook. (See Def.s' Ex. 7, attachment 3.) The evidence is also clear that, on the same date, female inmates at the Scott facility could participate in the following six BAT certified apprenticeships: cook, dental assistant, landscape gardener, building maintenance repair, maintenance electrician, and painter. (See id.) No camp facility, male or female, offered apprenticeships as of October 31, 1998. (See Def.s' Ex. 4.) Female inmates housed at Camp Branch may transfer to the Scott or Crane facilities to participate in apprenticeships, while male inmates housed in camp facilities may not transfer out to participate in apprenticeships. (See Zang, Tr., Vol. I at 152-53.)

Participation numbers are low in the apprenticeships mentioned. As of October 31, 1998, eight male inmates were enrolled in apprenticeships at the Marquette Branch prison, five female inmates were enrolled in apprenticeships at the Crane facility, and six female inmates were enrolled in apprenticeships at the Scott facility. (See Def.s' Ex. 4.) Based on the monthly reports of each facility, which are in evidence as MDOC business records, plaintiffs argue that substantial, informal apprenticeships appear to exist at two additional male facilities: Huron Valley Men's Facility ("HVM") and Riverside Correctional Facility ("RCF"). (See Pl.s' Amended Findings of Fact and Conclusions of Law at 12; see also Pl.s' Ex. 4.) If accurate, the monthly reports from these facilities indicate that HVM had 30 male inmates participating in apprenticeships as of April 1998 and that RCF had 14 male

inmates participating in apprenticeships as of June 1998. (See Pl.s' Ex. 4.) Ms. Zang has testified, however, that she believes the apprenticeship numbers reported by HVM and RCF to be inaccurate due to a computer problem. (See Tr., Vol.1 at 118-25.) Based on her communications with HVM and RCF officials, Ms. Zang further testified that HVM and RCF do not currently operate apprenticeship programs.[15] (See id.)

In any event, I need not rule on the question of the HVM and RCF reports because, even if true, their additional enrollment numbers would not disturb my determination that the State of Michigan presently provides an array of traditional apprenticeship opportunities to the female inmates that is sufficiently comparable to that provided the male inmates. The evidence on record shows that *all* female inmates who desire to participate in an apprenticeship and can meet MDOC eligibility requirements have the opportunity to enroll in seven different kinds of apprenticeships. In telling contrast, only a small portion of all male inmates who desire to participate in an apprenticeship and can meet MDOC eligibility requirements have the opportunity to enroll in the twelve different kinds of apprenticeships offered at the Marquette Branch Prison. In other words, female inmates as a group enjoy much greater access than male inmates as a group. As with vocational opportunities, the literal difference in the numbers - seven as compared to twelve - does not constitute a disparity of constitutional dimension under the Equal Protection Clause. Turner affords prison administrators the discretion to develop these prison programs within the constraints of legitimate penological interests. A literal requirement of identical treatment - meaning the same number of programs of identical subject matter would have to be provided to inmates of either gender - would violate Turner's interpretation of constitutional protections in the prison setting.

The evidence on the record with respect to the MSI and OJT programs does not alter this analysis. Of the 1,192 inmates employed by MSI as of the end of September 1998, 1,130 were male inmates and 62 were female inmates. (See

[15] Ms. Zang's affidavit of January 20, 1999, which is not before me as evidence, documents these communications. (See Def.s' Proposed Findings of Fact and Conclusions of Law at 20-25, quoting full text of affidavit.)

Def.s' Ex. 7, attachment 1.) While this may seem a great disparity at first glance, further analysis reveals that the September 1998 employment rates for female inmates as a group compared to those for male inmates as a group are more than comparable: 3.6% for female inmates versus 2.8 % for male inmates.[16] (See Def.s' Ex. 7 at 8.) And although male inmates as a group may have a greater array of MSI programs (twenty as opposed to five), pursuant to Turner this is a reasonable restriction on the female inmates given their vastly smaller population size.

The OJT evidence is beset by accuracy concerns. As previously mentioned in this opinion with respect to vocational opportunities, Ms. Zang testified that several of the monthly reports supposedly documenting male inmates enrolled in OJT are erroneous. (See Zang, Tr., Vol.1 at 130-34.) The male OJT participants reported may actually exist or they may simply be improper classifications by prison officials of inmates participating in informal work arrangements. Likely it is a mix of the two. Whatever the case, the OJT program, which formally exists only for male inmates, is provided by only a few of the thirty-seven major male facilities. (See Pl.s' Amended Findings of Fact and Conclusions of Law at 14-15.) Thus as a group, male inmates enjoy only a slight rehabilitative benefit from the OJT programs. Given that female inmates already have a robust and sufficiently comparable opportunity to participate in traditional apprenticeship and prison industry opportunities, this minor benefit to the males does not constitute a disparity in treatment under the Equal Protection Clause.

In light of these reasons, I hold that defendants have presently achieved sufficient parity of treatment between male and female inmates in the matter of apprenticeship opportunities.

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16 Mr. Mahoney reports employment rates of 0.028 % for males and 0.036 % for females. (See Def.s' Ex. 7 at 8.) I have performed the same calculations using his September 1998 data and have determined that he erred in his calculations because he failed to move the decimal upon converting to a percentage figure.

D. Work-Pass Opportunities

This area includes defendants' work-pass and public works programs. Plaintiffs have conceded that "'[t]he opportunity for women to participate in public works and work pass programming is substantially comparable to the opportunity provided to male prisoners." (Pl.s' Amended Findings of Fact and Conclusions of Law at 21.) Given this concession, I am satisfied that sufficient parity of treatment now exists in the matter of work-pass opportunities.

Conclusion

My findings of equal protection compliance in the matters of educational, vocational, apprenticeship, and work-pass opportunities require me to terminate my jurisdiction over defendants as to those matters. See Glover, 138 F.3d at 243. I conclude therefore that defendants' motion to terminate pursuant to Fed. R. Civ. P. 60(b)(5) is granted.

Yet the fear has been expressed by plaintiffs, sometimes explicitly, but always implicitly, that termination of my jurisdiction over defendants in these matters will prompt defendants to immediately discontinue any and all rehabilitative programming for the female inmates and thereby defeat the progress of the past twenty years. I hope such is not the result. If defendants were to choose that unwise course, the Due Process Clause might be implicated. See Beard v. Livesay, 798 F.2d 874, 876 (6th Cir. 1986) ("A state, by its own actions, may create liberty interests protected by the due process clause.")

Because the Sixth Circuit has retained jurisdiction in this case, I think it improvident at this time to order termination of my jurisdiction, even though I have concluded that such termination is now proper in light of my finding of parity.

s/
John Feikens
United States District Judge

DATED: Feb 19, 1999

No. 98-262

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

PERRY JOHNSON, *et al.*,
Petitioners

v.

EVERITT HADDIX, *et al.*,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICI* STATES OF OHIO, ALASKA, ALABAMA, ARIZONA, CALIFORNIA, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON AND WEST VIRGINIA, THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA AND THE TERRITORY OF GUAM IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act ("PLRA"), the attorney fee provision of PLRA Sec. 803(d), 42 U.S.C. 1997e(d) applies to fees awarded after the Act's effective date for services rendered after that date?

2. Whether, in such litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date?

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STATEMENT OF *AMICI* INTEREST

The 39 *Amici* States support Michigan's efforts to obtain the full measure of relief afforded by 42 U.S.C. §1997e(d). That statute is a reasonably crafted compromise between the legitimate need to obtain legal representation for prisoners and the states' equally legitimate need to limit the cost and disruption that resulted from excessive fee awards under prior law. The *Amici* appear because the decisions below "prolong the life of ... a judicial construction of civil rights statutes that Congress" quite properly "found wanting". *Landgraf v. USI Film Products*, 511 U.S. 244, 259 (1994).

The most obvious result of unduly continuing prior law is the continuing diversion of resources to pay excessive awards. For example, the states of Michigan and California have paid more than $11,490,000 to prisoners' attorneys since April of 1996. While that amount is significant in its own right, its real impact becomes apparent when one considers how those funds could have been more productively used. That sum could have purchased one year of health care for 4,776 inmates or a year of supervision of 6,759 parolees. Criminal Justice Institute, Inc. *The Corrections Yearbook* 1997, 74, 160 (1997).[1]

An even more important result is the disruption caused to the day to day operation of correctional facilities. Litigation has very real, and very adverse, effects. At a minimum, it diverts staff from operational tasks to such matters as discovery, trial preparation and actual in court testimony. More importantly, it can undermine discipline and order:

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[1] The figure in the text was calculated by dividing the total paid by the average national daily cost for the services in question and dividing the resulting figure by 365.

Even if correctional officials are able to "win" the suits against them, leadership may be hurt when wardens are placed on trial. In the adversarial process, plaintiff and defendant--prisoner and warden--are legally and symbolically equal, a fact that does not go unnoticed by those whom the warden must supervise.

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An institution whose prisoners have successfully sued administrators may find its staff fearful of becoming defendants in another lawsuit and thus reluctant to exercise discretion to solve festering and potentially serious problems. The emotional costs of litigation for staff and inmates may increase tensions, with ensuing management and security problems.

G. Cole, R. Hanson, and J. Gilbert, *Alternative Dispute Resolution Mechanisms for Prisoner Grievances: A Reference Manual for Averting Litigation*, (National Institute of Corrections, U.S. Dept of Justice 1984) 6, 8 (footnotes omitted). Unfortunately, excessive fee awards under prior law provided incentives to unduly broaden and prolong prisoner cases, aggravating those problems.

Indeed, once a lawsuit interjects counsel into a prison they stay involved for inordinately long periods of time. For example, institutional reform litigation often develops a life of its own, as evidenced by the fact that some States are burdened by decrees entered more than a generation ago. *See Campbell v. McGruder*, Case No. 1462-71 (D.D.C. 1971) (decree pending for twenty-seven years); *Hines v. Anderson*, 439 F.Supp. 12 (D.Minn 1977) (decree pending for twenty-one years). Indeed, the cases at bar are well into their second decade.

Congress was aware of those problems and passed the Prison Litigation Reform Act, P.L. 104-134, 110 Stat. 321 ("PLRA"), to help States deal with them. It specifically sought to address the problems caused by excessive fee awards by including the provisions now codified in 1997e(d). 141 Cong. Rec. H1042 (daily ed. Feb. 1, 1995) (statement of Rep. Hoke); 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995) (Statement of Rep. Canady); 141 Cong. Rec. S14317 (daily ed. Sept. 29, 1995) (statement of Sen. Abraham) That statute addresses the problems described above by, *inter alia*, eliminating awards for services not necessary to vindicate federal rights and precluding disproportionate awards, thus eliminating financial incentives to improperly expand prison cases. Nonetheless, it still allows reasonable compensation for counsel who vindicate federal rights, authorizing such counsel to recover 150% of the hourly rate allowed under the Criminal Justice Act, 18 U.S.C. 3006A.

Unfortunately, the lower courts have been reluctant to give effect to that fair compromise. The States bear the costs. Consequently, the 39 *Amici* States strongly support Michigan's efforts to have § 1997e(d) applied according to its plain terms.

SUMMARY OF ARGUMENT

Landgraf v. USI Film Products, 511 U.S. 244 (1994), provides a two-step analysis for determining whether a statute applies to matters predating its enactment. Under that analysis "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need" for further judicial analysis. *Id.* at 280. The second step, taken only if Congress has not set the temporal reach of a statute, is to determine whether applying the new law would have an improper retroactive effect. If so, the statute will not apply.

Both steps compel application of 42 U.S.C. § 1997e(d) to all post-enactment fee awards, regardless of when the underlying services were rendered. In addition, other precedent independently requires that fee requests for services rendered after § 1997e(d)'s enactment be controlled by that statute.

The plain language of § 1997e(d) clearly expresses Congress' intent that the statute apply to all post enactment fee requests, regardless of their chronology. It applies to requests made "in *any* action" concerning prisoners' rights and this Court has consistently held that such language "could not be broader," "does not hint of an exception," *Hutto v. Finney*, 437 U.S. 678, 694 (1978), and is an "unambiguous, direct, clear" direction that it should be applied "without qualification." *Ex parte Collette*, 337 U.S. 55, 58 (1949). Section 1997e(d) further provides that it should apply in all such cases whenever "brought," a backward looking verb that encompasses cases pending when the statute was enacted. Such "use of a verb tense is significant" and indicates that § 1997e(d) controls cases "brought" before enactment. *United States v. Wilson*, 503 U.S. 329, 333 (1992).

That is not overcome by the Sixth Circuit's negative inference based upon the fact that the matters eventually codified in § 1997e(a) were transferred from a section of the PLRA made expressly applicable to pending cases to another section not accompanied by such provisions. There are two reasons for that.

First, and of paramount importance, § 1997e(d) expressly provides that it is to be applied in "*any* action *brought*" by a prisoner, an "unambiguous directive" that the statute applies "without hint that some [cases] should be included." *Ex parte Collette*, 337 U.S. at 58. Therefore, it is highly improper to infer that any matters so clearly within the

scope of § 1997e(d) should be exempted because of something that was not in the statute. Indeed, the precedent the Sixth Circuit relied upon in drawing such an inference, *Lindh v. Murphy*, ___ U.S. ___, 117 S.Ct. 2059 (1997), recognized that the sort of language used in § 1997e(d) would qualify as "clear statement of retroactive effect" which should be given effect. *Id.* at 2064 n. 4 (citing the phrase "any civil action" as an example of an express provision for retroactive effect). That should have ended the matter.

Second, Congress had other reasons for changing the location of the provisions now codified in § 1997e(d) within the PLRA. Those reasons included the different nature of the matters covered by the different portions of the Act and the location of the matters now codified in § 1997e(d) within the appropriate chapter of the United States Code. More importantly, Congress likely assumed that there was no need to make extrastatutory provision regarding the applicability of § 1997e(d) to pending cases because the text of the statute itself expressed Congress' intention to control such cases. Such an explanation is further supported by the fact that the PLRA was passed shortly after *Landgraf* which indicated that it would be "uniquely" appropriate to apply statutes regulating attorneys' fees to pending cases, even absent express direction. 511 U.S. at 277.

In sum, § 1997e(d) contains the sort of unambiguous directions that require application under *Landgraf's* first step. Those clear expressions cannot be overcome by what is not in the statute. Therefore, the first phase of the *Landgraf* analysis should also have been the final phase.

However, *Landgraf's* second phase also supports application. Section 1997e(d) cannot be improperly retroactive because it does not regulate the parties' primary conduct. That primary conduct occurs inside "jail[s], prison[s] or other correctional facilit[ies]", § 1997e(d)(1),

and involves immediate, and often volatile, interactions between prisoners and with prison staff. It was not driven by the variables to be used in the fee calculations years later in a distant courthouse. Hence, it is unlikely that plaintiffs in such suits will be unfairly surprised by application of § 1997e(d).

Moreover, even if application of § 1997e(d) would upset their subjective expectations, it does not improperly "impair rights" for purposes of *Landgraf*. Section 1997e(d) regulates fee awards. Parties have no common law "right" to recover attorneys' fees and only an uncertain expectation of such a recovery under 42 U.S.C. § 1988 prior to receiving an actual award. Hence, § 1997e(d) cannot "impair rights" in such a manner as to have an improper retroactive effect under *Landgraf*.

Finally, the Sixth Circuit erred in holding that *Landgraf* precludes application of § 1997e(d) to requests for fees for services rendered after the statute's enactment. By its very terms, *Landgraf* is limited to situations involving "a federal statute enacted *after* the events in suit." *Id.* at 280 (emphasis added). Hence, application of § 1997e(d) fee requests based on post-enactment services cannot be precluded by *Landgraf*.

However, other precedent provides a rule of decision. This Court has consistently upheld the application of new statutes to post enactment matters arising in pre-enactment cases. Indeed, that approach has been followed in both civil and criminal cases. *Ex parte Collette*, 337 U.S. at 71; *McBurney v. Carson*, 99 U.S. 567, 569 (1878); *Dobbert v. Florida*, 432 U.S. 282, 292-293 (1977). There is no reason to depart from that settled practice here.

ARGUMENT

A. The Plain Language of § 1997e(d) Requires That It Be Applied to All Fee Requests Regardless of When the Underlying Services were Rendered

The most important part of any retroactivity analysis "is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. A review of the relevant portions of § 1997e(d) reveals that Congress provided the types of "unambiguous directives" and "express commands" described in *Landgraf* and *Lindh*, 117 S.Ct. at 2062-2063, indicating that the statute applies to all fee awards considered after its enactment, regardless of when the underlying services were rendered.

1. Congress' Direction That § 1997e(d) Apply "In *Any* Case *Brought* By a Prisoner" Makes It Expressly Applicable to All Post Enactment Fee Awards.

Section 1997e(d) clearly expressed Congress' intent to reach pending cases in two ways.

The first is the absolute and unqualified statement that § 1997e(d) applies "in *any* action brought by a prisoner," a broad statement without temporal limitation (emphasis added). On a general level, the term "any" indicates that Congress intended the statute to cover "all [cases], without restriction," *County of Chicot v. Lewis*, 103 U.S. 164, 167 (1881), requiring a "broader and more comprehensive coverage" than applied below. *United States v. Rosenwasser*, 323 U.S. 360, 362-363 (1945). Of more particular interest, the Court has recognized that the almost identical phrase "any civil action" is an "unambiguous, direct, clear" indication that

a statute is intended to apply "without qualification, without hint that some [cases] should be excluded," *Ex parte Collett*, 337 U.S. 55, 58 (1949). See also *Hutto v. Finney*, 437 U.S. 678, 694 (1978) ("The act itself could not be broader. It applies to 'any' action brought to enforce certain civil rights laws. It contains no hint of an exception..."); *N.A.A.C.P. v. New York*, 413 U.S. 345, 355-356 (1973). Bringing the matter to the sharpest possible focus, *Lindh* strongly suggests that such a phrase would "qualify as a clear statement of retroactive effect." 117 S. Ct. at 2064 n.4 (highlighting the phrase "any civil action" set forth in 28 U.S.C. § 1346(a)(1)).

That is reinforced by § 1997e(d)'s second "express command," the statement that it apply to all actions "brought" by a prisoner. That term is used generally, and in § 1997e(d), as the past tense of the word "bring." *Black's Law Dictionary*, 194 (6th Ed. 1990) ("past tense of 'bring'. *See* bring suit, *supra*"). Congress' choice of that backward-looking verb to describe the statute's coverage plainly indicates that it intended § 1997e(d) to control awards in cases that were "brought" before it was enacted. Indeed, that indicator is particularly compelling because Congress phrased other, more substantive portions of § 1997e(a) in prospective terms. See §§ 1997e(a) ("No action *shall be* brought . . ." until administrative remedies are exhausted) and 1997e(e) (No action "may *be* brought" to recover certain types of damages) (emphasis added). As this Court has noted, "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992). In this case, it clearly expressed Congress' intent to control pending cases.

In sum, the "unambiguous, direct, clear" directive that § 1997e(d) control "*any* case *brought*" makes "congressional intent clear" and, hence, "it governs." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

2. Neither the History nor the Structure of the PLRA Justify Any Other Result.

The Court below relied upon *Lindh* and the facts that Congress expressly made § 802 of the PLRA applicable to pending cases and that § 1997e(d) was moved from that section to PLRA § 803, which was not accompanied by such provisions, to infer that Congress did not intend § 1997e(d) to control pending cases. That analysis is flawed on two levels.

First, and most importantly, Congress has clearly spoken on the temporal reach of § 1997e(d) and an "implication based upon what is not in the statute is weakest when it suggests results strangely at odds with other textual indications." *Field v. Mans*, 516 U.S. 59, 75 (1995). As just explained, Congress clearly mandated that the statute apply "to *any* action *brought* by a prisoner." Indeed, *Lindh* itself cited the very similarly phrased language of 28 U.S.C. § 1346 (a)(1) as an example of the type of language that would clearly require retroactive application. 117 S. Ct. at 2064 n.4. When Congress has plainly spoken the first, and last, act of judicial construction is to apply the statute according to its terms. No implication can be made as "it would be dangerous in the extreme to infer that a case for which the words of [a statute] expressly provides shall be exempted from its operation." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Sturges v. Crowninshield*, 4 Wheat 122, 202 (1819)).

Second, unlike the legislation construed in *Lindh*, Congress had reasons for the way it structured the PLRA that are unrelated to the temporal reach of § 1997e(d). There were at least three such reasons.

a. *Lindh* based its negative inference on the fact that the two parts of the act at issue were so closely related that it

was very likely that in choosing different language Congress chose different results. *Lindh*, 117 S.Ct. at 2065. However, when statutes are less closely related, such a negative inference is less strong, especially when other textual pointers suggest a different result. *Field*, 516 U.S. at 75. Although the provisions contained in PLRA §§ 802 and 803 have partially overlapping purposes, they further them in completely different manners and therefore lack the close relationship underlying the *Lindh* implication.

PLRA § 802 amended 18 U.S.C. § 3626 to limit the substantive relief available in prisoner cases, affecting the immediate, primary conduct of the litigants behind prison walls. In contrast, § 1997e(d) affects their procedural interests long after the outcome of their primary dispute has been resolved. Because of the disparate nature of those two statutes, the close relationship underlying *Lindh* is absent and a *Lindh* type inference is inapposite.

b. A second reason is the structure of the United States Code. The general subject of civil rights and the specific subtopics of attorneys' fees and the rights of the institutionalized are controlled by Title 42. See 42 U.S.C. §§ 1981-1997j, inclusive. The PLRA's amendments to those statutes were set forth in § 803 while § 802 dealt exclusively with amendments to Title 18. Moving the provisions now codified in § 1997e(d) to § 803 is not inextricably linked to a desire to limit their temporal reach, but instead can be explained by the fact that placement there in consistent with the structure of the Code.

c. Finally, and most importantly, the plain language of the provisions codified § 1997e(d) made it unnecessary to include them in the section of the PLRA made expressly applicable to pending cases. The unqualified mandate that § 1997e(d) control "any" case, whenever "brought," clearly made it applicable to pending cases. Given that language, it

was perfectly logical for Congress to assume that the statute would apply to pending cases, even if it was moved from § 802 to § 803.

Indeed, such an assumption is strengthened by the fact that Congress drafted the PLRA in the shadow of *Landgraf*, which held that it is "uniquely" appropriate for new attorney fee statutes to apply in pending cases, even without an express command. *Landgraf*, 511 U.S. at 277. *Landgraf* also indicated that a statute could be applied to pending cases based on its text alone, without a separate temporality provision in the underlying legislative act. *Id.* at 257-263, 273. See also, *Madrid v. Gomez*, 150 F.3d 1030, 1036 (9th Cir. 1998). Indeed, *Landgraf* expressly approved of such an approach, as exemplified in *United States v. Schooner Peggy*, 5 U.S. 103 (1801), as "simply a response to the language of the statute." 511 U.S. at 273. As this Court has noted, Congress is presumed to legislate with this Court's retroactivity precedents in mind. *Id.* at 261; *Lindh*, 117 S.Ct. at 2064. Hence, Congress likely thought that § 1997e(d) was independently applicable to pending cases and that there was therefore no need to make other provisions regarding its temporal scope.

B. Applying § 1997e(d) To All Post Enactment Fee Requests Would Not Have An Improper Retroactive Effect Regardless of When the Underlying Services Were Rendered.

Although Congress' clearly expressed intention is sufficient to settle the matter, application of § 1997e(d) is independently justified because it would not have the type of retroactive effect forbidden by *Landgraf*. On a fundamental level, the statute regulates matters that are so far removed from the parties' primary conduct that it cannot be impermissibly retroactive. Furthermore, this Court's

teachings on attorney's fees make it clear that litigants have no more than a subjective expectation of recovering any particular fee prior to its actual award, not the type of "right" sufficient to support a finding of improper retroactive effect under *Landgraf*. Those unavoidable realities justify application of § 1997e(d), regardless of when the underlying services were rendered.

1. Section 1997e(d) Does Not Regulate Primary Conduct.

The touchstone for determining if a statute has an improper retroactive effect is whether it unfairly changes the substantive legality of the parties' pre-enactment "primary conduct," the conduct at issue in the underlying lawsuit. If the statute would change that substantive legality after the fact, it is improperly retroactive. If the statute merely changes the procedure for determining that substantive legality, application is permissible because parties have a diminished reliance interest in such procedure. *Landgraf*, 511 U.S. at 275.

More than a century of precedent establishes a sharp distinction between parties' primary conduct and the separate issue of how their attorneys will be paid. The subject was initially treated as so unrelated to the substantive rights litigated in federal courts that it was left to local discretion. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247-257 (1975). In 1881, the Court observed that a controversy over fees "though incidental to the cause . . . was a collateral one, having a distinct and independent character" from the dispute giving rise to a lawsuit. *Trustees v. Greenough*, 105 U.S. 527, 531 (1881). Hence, fee disputes were "regarded as so far independent" from the underlying cause of action as to be treated as a separate piece of litigation. *Id.* at 531. In 1939, this Court restated those

conclusions and added that fee controversies are "independent proceedings supplemental to the original" lawsuit. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 169, 170 (1939).

More recently, it has been observed that a "court's decisions of entitlement to fees will therefore require an inquiry *separate from the decision on the merits*" and that an award of fees cannot be "fairly characterized as an element of relief" on the merits. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-452 (1982) (emphasis added). Most tellingly, this Court has expressly relied upon that distinction to apply new fee statutes to pending cases, noting that "no increased burden was imposed since [the new statute] did not alter the [parties'] constitutional responsibility." *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 721 (1974).

The relationship between § 1997e(d) and the substantive matters underlying the cases it controls are just as separate. Those cases arise from disputes behind prison walls between prisoners and prison administrators. Prisoners, who are "mostly uneducated and indeed largely illiterate," *Lewis v. Casey*, 518 U.S. 343, 354 (1996), probably did not give much thought to such abstract concepts as proportionality and market rates in their interactions with corrections staff. They are concerned about more immediate matters as "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker, becomes, for the prisoner, a dispute with the State." *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973). Similarly, it is doubtful that "prison officials, on the spot and with the responsibility for the safety of inmates and staff," *Wolff v. McDonell*, 418 U.S. 539, 566 (1974), contemplated the fine points of lodestar calculations when meeting the intensely practical, and often violent, challenges giving rise to prisoner suits.

Given the nature of such disputes and the more pressing matters competing for the participants' attention, it is unlikely that parties based their actions, the "primary conduct" at issue in cases controlled by § 1997e(d), on the applicability of that statute. Therefore, applying that statute to their cases simply cannot have the type of unfair effect prohibited by *Landgraf*.

2. Parties Do Not Have "Rights" That Can Be "Impaired" by § 1997e(d).

Landgraf teaches that application of a statute is improperly retroactive if it would "impair rights." *Id.* at 280. Of crucial importance, it also makes clear that subjective expectations do not rise to the level of "rights" and that such expectations can be retrospectively "upset" without offending retroactivity principles:

> Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards. If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.

Id. at 270 n. 24 (citations and internal punctuation omitted). A party has no more than an unprotected, subjective expectation of recovering any particular fee prior to that fee being awarded. Hence, applying § 1997e(d) to fee requests is

not improperly retroactive, regardless of when the services giving rise to those requests were rendered.

It is well settled that parties have no common law right to recover their attorney's fees from opposing parties. *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Although Congress partially filled that void by making recovery of fees mandatory under some statutes, it did not mandate such a recovery under 42 U.S.C. § 1988. *Id.* at 261-262. Instead, it made any award discretionary. n.34; H. Rep. 1558, 94th Cong., 2d. Sess. (1976) 3, 5, 8. Consequently, "§ 1988 does not guarantee that lawyers will recover fees..." *Kentucky v. Graham*, 473 U.S. 159, 168 (1985). Instead, counsel may not recover fees unless they meet their burden of proving that an award is appropriate, a burden that some have suggested may only be met with clear and convincing evidence. *Hensley v. Eckerhart*, 461 U.S. 424, 441 (1983) (Burger, C.J., concurring).

Moreover, "[C]ongress does not authorize an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill." *Id.* at 436. Some final, enforceable relief on the merits must be obtained. Interlocutory triumphs and other successes, no matter how impressive, are not sufficient to make a litigant eligible to recover fees as a "prevailing party." *Hanrahan v. Hampton*, 446 U.S. 754, 757-758 (1981); *Kentucky v. Graham, supra*. Once that threshold has been crossed, a significant degree of success must be shown as the fact "that a plaintiff is the prevailing party may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley*, 461 U.S. at 436. See also *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). Finally, even if those criteria are met, expectations of fees may be dashed by subsequent developments having nothing to do with the case itself. *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Hewitt v. Helms*, 482 U.S. 755 (1987).

In sum, plaintiffs have nothing more than a subjective expectation that they will recover any particular fee prior to actually receiving an award under § 1988. They certainly do not have a "right" that could be improperly "impaired" for purposes of *Landgraf*. Hence, applying § 1997e(d) to all awards made after the enactment of the statute would not offend retroactivity principles.

C. Application of § 1997e(d) to Fees for Post Enactment Services is Required Without Regard to *Landgraf*.

Although the *Amici* submit that application of § 1997e(d) is consistent with *Landgraf* regardless of when the services giving rise to the fees were rendered, a different analysis independently supports that result with regard to fees for services rendered after enactment.

Initially, it must be noted that the Sixth Circuit erred in holding that *Landgraf* precludes application of § 1997e(d) to requests for fees for *post*-enactment services. *Landgraf* only controls if the statute at issue changes the consequences of conduct that *preceded* enactment. It applies only "when a case implicates a federal statute enacted *after* the events in suit." *Id.* at 280 (emphasis added). Hence, application of § 1997e(d) to fee requests for post-enactment services cannot possibly be precluded by *Landgraf*.

More importantly, application of § 1997e(d) to such requests is supported by a stream of precedent that is both wide and deep. Once source flows from this Court's civil jurisprudence. For more than 120 years, this Court has upheld application of statutes passed after the initiation of suit to post filing, post-enactment matters covered by their terms. *Ex parte Collette*, 337 U.S. 55, 71 (1949); *McBurney v. Carson*, 99 U.S. 567, 569 (1878). The other source springs

from criminal cases, where, as summarized in *Dobbert v. Florida*, 432 U.S. 282, 292-293 (1977), the Court has consistently upheld the application of new rules or statutes in pending cases, even when those changes would disadvantage the criminal defendant.

There is no reason to depart from that pattern here. There can be no claim of unfair surprise because the fee limitations of the PLRA were widely known prior to passage of the Act. Kirk Victor and Peter Stone, *From the K Street Corridor*, The National Journal, Jan. 13, 1996, at 76; John Dunne, *Unconscionable Limits on Prisoner Lawsuits*, The Washington Post, Nov. 8, 1995, at A17. Moreover, once § 1997e(d) was enacted prisoners' counsel were on notice of its terms because, like all persons, they are presumed to know the law. Most importantly, appropriate compensation of counsel in federal cases is within the sound discretion of Congress and this Court has been reluctant to find reason to depart from fee provisions that are far more parsimonious than § 1997e(d). *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). Hence, counsel seeking to recover fees for services rendered after § 1997e(d)'s enactment can claim neither procedural surprise nor substantive hardship. Therefore, there is no reason to depart from this Court's settled precedents.

CONCLUSION

For the foregoing reasons, the 39 *Amici* States urge the Court to reverse the decisions below and hold that 42 U.S.C. § 1997e(d) controls all requests for attorney's fees considered after its enactment, regardless of when the services giving rise to those requests were rendered.

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December 31, 1998

No. 98-262

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

PERRY JOHNSON, *et al.*,
Petitioners,

v.

EVERETT HADIX, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 members, dedicated to preserving and protecting the Bill of Rights. The American Civil Liberties Union Fund of Michigan is one of the ACLU's state affiliates. The ACLU established the National Prison Project (NPP) in 1972 to protect and promote the civil rights of prisoners. The ACLU through the NPP and many of its affiliates has filed suit pursuant to 42 U.S.C. § 1983 to protect these rights. As a result of such litigation, the NPP and ACLU affiliates have been the recipients of attorney's fees awarded to prevailing plaintiffs pursuant to 42 U.S.C. § 1988. The amount of fees that the ACLU Foundation and its affiliates will receive as a result of such litigation will be affected by the outcome of this case.[1]

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[1] Pursuant to Sup. Ct. R. 37.6, undersigned counsel avers that no counsel for a party authored this brief, in whole or in part, and no person or entity other than the amici listed as submitting this brief made a monetary contribution to the preparation or submission of the brief.

This Court granted a writ of certiorari to the Sixth Circuit Court of Appeals to review the decision in *Hadix v. Johnson*, 143 F.3d 246 (6th Cir.), *cert. granted in part*, 119 S. Ct. 508 (1998), involving the consolidated cases of *Everett Hadix et al. v. Perry Johnson et al.*, No. 80-73581 (E.D. Mich.) and *Mary Glover et al. v. Perry Johnson et al.*, No. 77-71229 (E.D. Mich.). The NPP is not and has never been counsel in either of these Eastern District of Michigan cases, and will not recover any attorney's fees in those cases. The NPP does however serve as counsel for plaintiffs in *Everett Hadix et al. v. Perry Johnson et al.*, No. 4:92-CV-110 (W.D. Mich.). This case is pending in the Western District of Michigan as a result of the Sixth Circuit's decision to consolidate certain issues from *Hadix* with a case in the Western District of Michigan. *See Knop v. Johnson*, 977 F.2d 996, 999, 1014 (6th Cir. 1992) (remanding *Hadix* claim to Western District of Michigan). Subsequently, the parties agreed that certain additional issues in *Hadix* should be transferred to the Western District case. Following that transfer, the NPP appeared as counsel for plaintiffs in the Western District case only.

The parties have consented to the filing of this brief as indicated by their letters of consent filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Contrary to Petitioners' argument, there is nothing in the text of 42 U.S.C. § 1997e(d), the attorney's fees provision of the Prison Litigation Reform Act (PLRA or Act), that mandates its application to pending cases. At the time Congress enacted the PLRA, it knew how to draft legislation that specified its application to pending cases, and it knew from this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that the fees provision would require an express direction that the provision apply to pending cases for it to do so.

Despite these facts, the evolution and structure of the fees provision as it progressed toward enactment show that Congress deliberately moved the provision from a section of the PLRA that contained an express mandate for the provision's application to pending cases to a section that lacked such an express direction. In this respect, the PLRA's historical evolution, like that of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C.A. § 2254(d) (West Supp. 1998), at issue in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), supports a strong inference that Congress did not intend that the fees provision apply to pending cases.

Part of the PLRA fees provision reduces a plaintiff's damages award by providing that attorney's fees must be paid out of any monetary judgment. Congress would have known, in light of well-settled principles discussed in *Landgraf*, that this part of the fees provision has a retroactive effect. Therefore, the inference is particularly strong that Congress transferred the entire fees provision out of a section of the PLRA that mandated application of its provisions to pending cases in order to avoid

the unfair retroactive effect of applying the fees provision in pending cases.

Moreover, the balance of the fees provision also has a retroactive effect in cases filed before the PLRA's enactment. By reducing the amount of fees that can be recouped from defendants, the provision increases the potential liability of a plaintiff to his or her retained lawyer after the plaintiff has decided to retain counsel and file suit. The fact that this provision involves attorney's fees does not preclude an analysis of whether the provision has a retroactive effect. Indeed, this Court has made clear that the "functional conceptio[n] of legislative 'retroactivity'" is a flexible one responsive to the actual effects of the legislation in question. *See Hughes Aircraft v. United States ex rel. Schumer*, 117 S. Ct. 1871, 1876 (1997) (alteration in original) (quoting *Landgraf*, 511 U.S. at 269).

For similar reasons, the decision in *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974), counsels against the application of this fees provision to pending cases because such application would cause "manifest injustice." This manifest injustice would affect not only the plaintiffs in pending cases but also their lawyers who have an ethical obligation to continue to provide services despite a substantial reduction in compensation.

ARGUMENT

I. UNDER GENERAL RULES OF STATUTORY INTERPRETATION, THE LANGUAGE, STRUCTURE, AND HISTORICAL EVOLUTION OF THE ACT DEMONSTRATE THAT CONGRESS INTENDED THE PLRA ATTORNEY'S FEES PROVISION TO APPLY PROSPECTIVELY

A. The Language of the PLRA

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Court enunciated general principles governing the application of new statutes to pending cases. Among these principles is the following: "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. Petitioners and their Amici argue that, under *Landgraf*, the "plain language" of the PLRA fees provision commands its application to cases that were pending on the date of the PLRA's enactment. *See* Petitioners' Br. at 14; Amici's Br. at 7.[2]

The introductory paragraph of the PLRA fees provision reads as follows:

> (d) Attorney's Fees -- (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent [provided below].

42 U.S.C.A. § 1997e(d) (West Supp. 1998).

Petitioners and their Amici rely on the use of words such as "any" and "brought" to support their plain language argument. *See* Petitioners' Br. at 14; Amici's Br. at 7. They place a weight on these isolated words that the words cannot bear. For this

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[2] Petitioners make this argument despite their concession that "neither the text nor the legislative history of the PLRA expressly address the precise question of whether the attorney's fee provision applies to cases pending on the Act's effective date . . . ." Petitioners' Br. at 14.

language to convey the intent that they ascribe to it, the language would need to say, in some clear manner, that the provision applies to pending cases. For example, in *Lindh*, this Court noted that the following language "might possibly have qualified" as a clear statement: "[This Act] shall apply to *all* proceedings pending on or commenced after the date of enactment of this Act." 117 S. Ct. at 2064 n.4. The clarity of this statutory language arises from its reference to application to pending cases. In contrast, the argument from Petitioners and their Amici is entirely circular; only if the provision is first assumed to apply to pending cases does the language appear to address its temporal applicability.[3]

Each of the arguments from Petitioners and their Amici regarding the language of the section has been rejected by this Court. Amici argue that the use of the word "any" in the fees provision means that Congress meant that the provision was to apply to "any" action, including pending cases. *See* Amici's Br. at 7-8. Indeed, Amici argue that "*Lindh* strongly suggests that such a phrase [as any civil action] would qualify as a clear statement of retroactive intent." *Id.* at 8 (quoting *Lindh*, 117 S. Ct. at 2064 n.4). At the point in the *Lindh* footnote cited by Amici, the Court was discussing language relevant to the *scope* of a waiver of sovereign immunity, where there was no question but that sovereign immunity had been waived as to some class of suits.[4] In another context, this Court specifically rejected the

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[3] *Cf. Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

[4] Petitioners note that this Court quoted the "in any action" language in considering the attorney's fees statute at issue in *Hutto v. Finney*, 437 U.S. 678 (1978). *See* Petitioners' Br. at 15. Significantly, however, the Court relied on that language in rejecting an Eleventh Amendment challenge to the statute; it did not use the language to determine

argument that the use of the term "any" in a statute that authorized suit against "any recipient of Federal assistance" was sufficient to waive the sovereign immunity of a state because the statute lacked the "kind of unequivocal statutory language" necessary to abrogate Eleventh Amendment immunity. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

Second, they claim that it is significant that the fees provision employs a verb in the past tense in the phrase "action brought by a prisoner." *See* Petitioners' Br. at 15; Amici's Br. at 8. "Brought" is self-evidently not a verb in the phrase "in any action brought by a prisoner"; it is a participle used in an adjectival phrase modifying the noun "action." Because "brought" is functioning as an adjective rather than a verb, the Court's decision in *United States v. Wilson*, 503 U.S. 329, 333 (1992), which attaches significance to the tense of a verb in a statute, has little relevance.

Moreover, this Court in *Landgraf* considered whether 42 U.S.C. § 1981a(a), which refers to "an action brought by a complaining party," includes a clear expression of retroactive intent. This Court rejected the argument that Congress had expressly prescribed the section's temporal applicability. *See Landgraf*, 511 U.S. at 251-63.

If general language of this sort were dispositive of the temporal application of a statute, then this Court would have held in *Lindh* that the provision there at issue similarly contained a clear statement of congressional intent that it be applied to pending cases. That provision provides that "[a]n application for a writ of habeas corpus . . . shall not be granted" except as provided. 28 U.S.C.A. § 2254(d). Theoretically, one could argue that Congress' use of the mandatory "shall" constituted a

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the temporal reach of the statute. *See Hutto*, 437 U.S. at 694.

clear statement of intent that a federal court was to apply the statute to every application for a writ of habeas corpus after the effective date of the provision. However, the entire Court in *Lindh* rejected the argument that this provision contained a clear statement of temporal applicability. *See Lindh*, 117 S. Ct. at 2063-64; *id.* at 2068 (Rehnquist, C.J., dissenting).

In drafting the PLRA attorney's fees provision, after *Landgraf*, Congress could have used many formulations that would have unmistakably conveyed its intent that the fees provision apply to pending cases. Congress could have used language parallel to the language quoted in *Landgraf* from an earlier, unsuccessful amendment to the statute at issue there: "(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989[.]" 511 U.S. at 255 n.8. Alternatively, Congress could have used the language that *Lindh* quotes from *Landgraf* regarding application to "*all* proceedings pending[.]" 117 S. Ct. at 2064 n.4. Indeed, Congress used very similar language in the AEDPA, a statute passed contemporaneously with the PLRA, to convey an intent that one chapter of the AEDPA was generally to apply to pending cases. *See Lindh*, 117 S. Ct. at 2063 ("shall apply to cases pending on or after the date of enactment"). Finally, Congress could have expressed its intent through the PLRA language that initially accompanied the fees provision, which specified that the provision "shall apply with respect to all relief . . . whether such relief was originally granted or approved before, on, or after the date of the enactment of this Act." H.R. 667, 104th Cong. § 301(b) (1995). Congress did none of these things; in fact it removed the fees provision from the reach of this retroactivity language. The remaining language simply does not rise to a clear statement of congressional intent for retroactive application.

B. The Structure and Historical Evolution of the PLRA

In *Lindh*, this Court addressed the question of whether chapter 153 of the AEDPA, 28 U.S.C.A. § 2254(d)), which governs habeas corpus proceedings in non-capital cases, applies to petitions pending when the Act was passed. *See* 117 S. Ct. at 2061. The Court found decisive the distinction between chapter 154 of the AEDPA, which governs habeas proceedings in capital cases and explicitly provides that it "shall apply to cases pending on or after the date of enactment," *id.* at 2063, and chapter 153, which does not contain comparable language. *See id.* at 2063-65. The Court concluded that this contrasting treatment regarding retroactivity in the two chapters necessarily meant that Congress "had the different intent that the latter chapter [153] not be applied to the general run of pending cases," noting that "[n]othing, indeed, but a different intent explains the different treatment." *Id.* at 2064.

The PLRA is substantially similar in this regard to the AEDPA provision considered in *Lindh*, and this Court's reasoning in that case is equally applicable here. The attorney's fees provision of the PLRA, which is found in § 803 of the Act, is silent as to whether it should be applied to pending cases or only prospectively to cases filed after the Act's passage. *See* 42 U.S.C.A. § 1997e(d). In contrast, § 802 of the Act, which governs "appropriate remedies" in prison conditions litigation, states that the section is to be applied to pending cases, as follows:

> Section 3626 of title 18, United States Code [this section], as amended by this section, shall apply with respect to all prospective relief *whether such relief was originally granted or approved before, on, or after the date of the enactment of this title* [Apr. 26, 1996].

Pub. L. No. 104-134, 110 Stat. 1321-66, renumbered Pub. L. No. 104-140, 110 Stat. 1327 (codified as amended at 18 U.S.C. § 3626) (emphasis added). This Court's analysis in *Lindh* compels the conclusion that Congress, by including an explicit statement that § 802 apply to pending cases and not including similar language in § 803, intended that the attorney's fees provision apply only to cases filed after the effective date of the Act.

This conclusion from the language and structure of the PLRA is consistent with the well-established principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). This maxim of statutory interpretation, *expressio unius est exclusio alterius*, must be applied unless there is clear evidence of a contrary legislative intent. *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993). There is no evidence from the Act itself that points to a contrary legislative intent to apply the fees provision retroactively.

Rather, as in *Lindh*, the legislative evolution of the Act bolsters the conclusion that Congress intended to apply the fees provision only to cases filed after the Act's passage. This Court recognized that the negative implication created by the disparate treatment of temporal reach in chapters 153 and 154 of the AEDPA was particularly strong because "the [two chapters] had already been joined together [in a single bill] and were being considered simultaneously when the language raising the implication was inserted," although they began life independently and in different houses of Congress. *Lindh*, 117 S. Ct. at 2065. The Court distinguished this history from one in which "two

chapters had evolved separately in the congressional process, only to be passed together at the last minute . . . ." *Id.* at 2064. In these circumstances, the Court reasoned that "there might have been a real possibility that Congress would have intended the same rule of application for each chapter, but in the rough-and-tumble no one had thought of being careful about chapter 153, whereas someone else happened to think of inserting a provision in chapter 154." *Id.* at 2064-65. In noting the familiar rule that a negative inference is strongest where disparate provisions have been joined in a single bill, the Court relied on its earlier ruling in *Field v. Mans*, 116 S. Ct. 437 (1995), in which it had recognized that "[t]he more apparently deliberate the contrast, the stronger the inference, as applied, for example, to *contrasting statutory sections originally enacted simultaneously in relevant respects*." *Lindh*, 117 S. Ct. at 2065 (emphasis added) (quoting *Field*, 116 S. Ct. at 446).[5]

The legislative evolution of §§ 802 and 803 of the PLRA is similar to that of the AEDPA sections at issue in *Lindh*. The precursor to the PLRA was introduced as part of the Violent Criminal Incarceration Act of 1995. H.R. 667, 104th Cong. (1995); S. 400, 104th Cong. (1995). Title II of the bill, entitled "Stopping Abusive Prisoner Lawsuits," was aimed at reducing frivolous prisoner litigation by amending provisions of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997 to 1997j, and the federal *in forma pauperis* proceedings statute, 28

[5] The Court in *Field* declined to apply the negative implication rule of construction to infer that Congress, by adding a reasonable reliance element to the false financial statement exception in the bankruptcy code, thereby intended not to require reasonable reliance in the fraud discharge exception in the code. *See* 116 S. Ct. at 441-43. The Court reasoned that application of a negative implication in this instance would lead to unreasonable results, was at odds with other textual pointers in the code, displaced settled common law, and was not supported by the legislative history of the statute. *See id.* at 442-47.

U.S.C. § 1915. *See* H.R. Rep. No. 104-21, at 5-6 (1995). Title II had neither an effective date nor an attorney's fees provision. *See id.* Title III of the bill, entitled "Stop Turning Out Prisoners" (STOP), was introduced to limit ongoing federal court involvement and available remedies in prison litigation. *See id.* at 5-7. The injunctive relief provisions and the attorney's fees provisions both appeared in Title III, which contained an explicit statement of its retroactive application. The House version of the bill at the time was slightly different from the enacted version and provides as follows: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all relief (as defined in such section) whether such relief was originally granted or approved before, on, or after the date of the enactment of this Act." H.R. 667, 104th Cong. § 301(b) (1995).[6]

[6] It would be possible to argue that even this language did not expressly prescribe application to the attorney's fees provision. However, the term "relief" was broadly defined in the bill as "all relief in any form which may be granted or approved by the court . . . ." H.R. 667, 104th Cong. § 301(a)(g)(2) (1995). Additionally, the term "relief" is frequently used to include attorney's fees. For example, plaintiffs routinely request an award of attorney's fees under fee-shifting statutes as part of the relief they seek in their complaints. Thus, there is nothing odd about referring to a statutory entitlement to fees as part of the relief, or remedy, that a plaintiff seeks by filing suit:

> [C]ongress enacted the fee-shifting provision as "an integral part of the remedies necessary to obtain" compliance with civil rights laws, . . . to further the same general purpose -- promotion of respect for civil rights -- that led it to provide damages and injunctive relief. The statute and its legislative history nowhere suggest that Congress intended to forbid *all* waivers of attorney's fees -- even those insisted upon by a civil rights plaintiff in exchange for *some other relief* to which

Thereafter, during the Senate floor debate on S. 400, a substitute bill entitled the "Prison Litigation Reform Act" was introduced. S. 1275, 104th Cong. (1995). The vast majority of S. 400's provisions, including the retroactivity provision, appeared in § 2 of the substitute bill. However, the attorney's fees provisions had been extracted from § 2 and transferred to a new section of the bill, § 3, which did not contain retroactivity language. The statute retained this structure until its final passage.[7]

Therefore, as in *Lindh*, the negative implication regarding retroactivity created by the disparity between §§ 802 and 803 is particularly pronounced given that the two sections had been joined together and were being considered simultaneously when the attorney's fees provision was moved from a section that was expressly retroactive to one that was not. Though the legislative evolution of the PLRA is not identical to that of the AEDPA (with the AEDPA an explicit retroactivity provision was added to one chapter and not the other after the two chapters had been

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> he is indisputably not entitled -- anymore than it intended to bar a concession on damages to secure broader injunctive relief.

Evans v. Jeff D., 475 U.S. 717, 731 (1986) (second emphasis added) (quoting S. Rep. No. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5912). In any event, Congress removed any question of the applicability of the retroactivity mandate in § 802 to the PLRA attorney's fees provision by moving this provision to § 803.

[7] In fact, the attorney's fees provision in § 803 was twice amended before final passage of the bill. First, the numerical cap on the hourly rate that could be awarded as attorney's fees was increased from 100% of CJA rates to 150%. *See* 141 Cong. Rec. H13874-01, *H13892 (daily ed. Dec. 4, 1995). Second, a provision authorizing an award of attorney's fees for enforcement work was added to the bill. *See id.*

joined), the difference does not vitiate the negative inference in the PLRA. Indeed, the inference from history is more compelling in this case. In *Lindh*, the Court drew an inference from silence in the section at issue. In contrast, in this case, Congress took the affirmative step of removing the attorney's fees provision from an explicitly retroactive section.

It is reasonable to infer that Congress was aware of this Court's strong reaffirmation of the presumption against retroactivity in *Landgraf*, and understood that moving the fees provision from § 802 to § 803 meant that it would not be applied to pending cases. As recognized by the court of appeals, what is now § 802 was first introduced to curb "perceived excesses of the federal judiciary in *pending* litigation . . . and was logically made expressly applicable to pending cases." *Hadix*, 143 F.3d at 255. In contrast, § 803 "is forward looking as [it is] aimed at curtailing the *filing* of frivolous lawsuits." *Id.* Even when it was first introduced as part of the expressly retroactive STOP Act, the attorney's fees provision likewise was aimed, in part, at "eliminat[ing] the financial incentive for prisoners to include numerous non-meritorious claims in sweeping institutional litigation . . . ." H.R. Rep. No. 104-21, at 28. After the fees provision was moved to § 803 in S. 1275, Senator Abraham, the sponsor of the new bill, also stated that the fees limitations were among several measures aimed at "reduc[ing] frivolous inmate litigation." 141 Cong. Rec. S14316 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham).[8] Congress' decision to move the fees provision from § 802 to § 803 makes sense given that the

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[8] Since attorney's fees are awarded only to a plaintiff who succeeds, at least in part, on the merits, it is apparent that the sponsors of the PLRA were employing a broad definition of a "frivolous" lawsuit. In fact, however, the PLRA fees provision is more likely to deter meritorious cases than it is to deter frivolous ones. In any event, while cutting the entitlement to fees undoubtedly does deter plaintiffs from filing new cases, cutting fees in cases already filed will not serve that purpose.

fees provision, like the other provisions in § 803, was forward looking and aimed at deterring prisoners from filing frivolous lawsuits.[9]

Moreover, Congress added a new subsection to the fees provision in S. 1275 that reduced a prevailing plaintiff's damage award by requiring that a portion of the judgment be applied to the fees awarded against the defendant and capping the defendant's liability for attorney's fees at 125% of the judgment. *See* S. 1275, 104th Cong. § 3(f)(2) (1995). This subsection remains in substantially similar form in § 803 of the enacted statute, at § 803(d)(2),[10] and is part of the fees provision at issue in this case.[11] Congress must have known that application of

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[9] Amici argue that the "more important" harm from litigation to vindicate the constitutional rights of prisoners is its adverse effect on the operation of correctional facilities. *See* Amici's Br. at 1-3. Amici's argument suggests that Congress intended to reduce the incentives to file suit created by the potential award of attorney's fees. Amici do not attempt to demonstrate, however, why Congress would have believed that reducing the availability of fees in existing cases would end existing litigation, particularly in light of plaintiff's counsel's ethical obligation, *see* Part III, *infra*, once counsel had entered an appearance in a case.

[10] *See* Pub. L. No. 104-134, 110 Stat. 1321-71, renumbered Pub. L. No. 104-140, 110 Stat. 1327 (codified as amended at 42 U.S.C. § 1997e(d)(2)). We will refer to this subsection of the PLRA attorney's fees provision as § 803(d)(2) for ease of reference, although technically it is § 803(d)(d)(2) of the enacted statute. *See* 42 U.S.C.A. § 1997e(d)(2) (West Supp. 1998). We will similarly refer to the following subsection of the fees provision as § 803(d)(3). *See id.* § 1997e(d)(3).

[11] Section 803(d)(2) provides that:

> Whenever a monetary judgment is awarded in an action described in paragraph (1) a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

42 U.S.C.A. § 1997e(d)(2).

§ 803(d)(2) to pending cases would reduce a plaintiff's potential award of damages and thus create an impermissible retroactive effect under *Landgraf*, as it is presumed to have legislated with this Court's rules of statutory interpretation and retroactivity precedents in mind. *See Lindh*, 117 S. Ct. at 2064; *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction . . . ."). The addition of § 803(d)(2) at the same time that the attorney's fees provision was removed from the STOP section of the bill, with its express command for application to pending cases, indicates that Congress recognized the unfairness of a retroactive application of the fees provision, and therefore intended that it not be applied to pending cases.

Congress' decision to move the entire fees provision, including the newly added subsection addressing monetary judgments, § 803(d)(2), creates an inference that also applies to the subsection addressing hourly rates, § 803(d)(3). *See* 42 U.S.C.A. § 1997e(d)(2)-(3). In particular, Petitioners' argument that words such as "any action" or "brought" expressly prescribe the temporal reach of the fees provision, *see* Petitioners' Br. at 14-18, does not take account of the fact that these words appear in the introduction to the fees provision, § 803(d)(1). *See* 42 U.S.C.A. § 1997e(d)(1). If, as demonstrated above, Congress did not use these words to mandate retroactive application of the subsection reducing a plaintiff's damages, then it could not have

used these same words to mandate retroactive application of the subsection capping a plaintiff's attorney's fees.

Had Congress been concerned to ensure that the fees provision remained applicable to pending cases after it was moved to § 803, it certainly could have added language to the provision making it expressly applicable to pending cases, as it had done with § 802.[12] That Congress chose not to do so is especially telling given that the PLRA was drafted and enacted shortly after the *Landgraf* decision, in which this Court strongly reaffirmed the presumption against retroactive application of new statutes to pending cases, and provided a clear message to Congress that it needed to be explicit if it intended new statutes to have retroactive effect. *See Landgraf*, 511 U.S. at 280.

In *Lindh*, this Court likewise was faced with interpreting a statute that was enacted in the shadow of *Landgraf*.[13] The Court observed that while *Landgraf* generally exempted purely procedural statutes from the presumption against retroactivity, *Lindh*, 117 S. Ct. at 2063-64, it "did not speak to the rules for determining the temporal reach" of statutory provisions like chapters 153 and 154 of the AEDPA which "will have substantive *as well as* purely procedural effects." *Id.* at 2063 (emphasis added).[14] Significantly, the Court therefore concluded as follows:

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[12] Congress' decision to move the fees provision to § 803 eliminated the possibility that § 802's retroactivity language would be applied to this provision. *See* footnote 6, *supra*.

[13] The AEDPA was signed into law on April 24, 1996, two days before the PLRA. *See* Pub. L. No. 104-132, 110 Stat. 1218 (codified as amended at 28 U.S.C. § 2254(d)); *see also* footnote 10, *supra*.

[14] Similarly here, the PLRA fees provision has substantive effects on a plaintiff's entitlement to damages and liability to his or her counsel. *See* Part II, *infra*.

> Since *Landgraf* was the Court's latest word on the subject when the Act was passed, Congress could have taken the opinion's cautious statement about procedural statutes and its silence about the kind of provision exemplified by the new § 2254(d) as counselling the wisdom of being explicit if it wanted such a provision to be applied to cases already pending.
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> * * * * *
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> If, then, Congress was reasonably concerned to ensure that chapter 154 be applied to pending cases, it should have been just as concerned about chapter 153, unless it had the different intent that the latter chapter not be applied to the general run of pending cases.

Id. at 2064.

Petitioners and Amici both suggest that *Lindh* is inapposite because the fees provision at issue here applies to conduct that is collateral or secondary to the merits of the underlying litigation. *See* Petitioners' Br. at 21; Amici's Br. at 10. That attorney's fees proceedings subject to § 803 may be characterized as addressing collateral or secondary conduct to the main cause of action, however, does not remove the section from a *Lindh* analysis. This Court in *Lindh* did not consider the nature of the conduct being regulated by the AEDPA in order to determine Chapter 153's applicability to pending cases; rather, this Court concluded under general rules of statutory construction that Congress intended chapter 153 to apply only prospectively, thereby "remov[ing] even the possibility of retroactivity." 117 S. Ct. at 2063. Indeed, the AEDPA section at issue in *Lindh*, which regulates federal habeas corpus proceedings in non-capital cases, could also be described as

regulating collateral or secondary conduct, or even tertiary conduct. *See id.* at 2070 (Rehnquist, C.J., dissenting).

Lindh governs this case. Given the inclusion of an explicit statement that § 802 applies to pending cases; the absence of a similar provision in § 803; and the structure and legislative history of the Act, the reasoning in *Lindh* dictates the conclusion that Congress intended that the attorney's fees provision in § 803 apply only to cases filed after the PLRA's enactment.

II. UNDER *LANDGRAF*, THE PLRA ATTORNEY'S FEES PROVISION HAS AN IMPERMISSIBLE RETROACTIVE EFFECT AND MUST NOT BE APPLIED TO CASES FILED BEFORE THE ACT'S EFFECTIVE DATE

As in *Lindh*, this Court can decide based on general principles of statutory construction alone that the PLRA attorney's fees provision does not apply to pending cases. A retroactivity analysis under *Landgraf* becomes necessary only if the Court determines under general principles that the fees provision in § 803 may apply to pending cases. Even then, however, a *Landgraf* analysis reveals that the fees provision has an impermissible retroactive effect on prisoner plaintiffs and cannot be applied to cases filed before the PLRA's enactment.

In the absence of clear congressional intent, the rule developed in *Landgraf* applies:

> [T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

511 U.S. at 280.[15] In *Landgraf*, the Court held that applying statutory provisions permitting a Title VII plaintiff to recover compensatory and punitive damages and to have a jury trial in cases arising before the enactment of these provisions would have an impermissible retroactive effect. *See id.* at 280-93. With respect to the compensatory damages provision, the Court reasoned that it "affects the liabilities of defendants . . . by requiring particular employers to pay for harms they caused," *id.* at 282, and "impose[s] on employers found liable a 'new disability' in respect to past events." *Id.* at 283. Conversely, the provision "confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged." *Id.*

The provision at issue here also has a retroactive effect. Section 803(d)(2) provides in part that: "Whenever a monetary judgment is awarded in an action described in paragraph (1) [prisoner's civil rights action], a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C.A. § 1997e(d)(2). Thus, a prisoner who filed suit before the PLRA

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[15] The discussion in Part I, *supra*, addressed the issues of clear statement and congressional intent. Therefore, this Part will focus solely on retroactive effect.

was enacted had the right, if successful, to have his or her attorney's fees paid for by the defendants pursuant to 42 U.S.C. § 1988. The PLRA diminishes that right, creating a mechanism that takes up to 25% of a monetary judgment award away from a successful prisoner plaintiff.[16] Just as the defendant's liability exposure for past events would have been altered retroactively in *Landgraf*, the plaintiff's potential damages would be altered retroactively here. The existence of a retroactive effect does not depend on the identity of the party who is disadvantaged through application of a newly enacted statute. As noted in *Landgraf*, a restriction on a plaintiff's rights, like the statute restricting a subcontractor's rights to recover damages in *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314-15 (1908), is a form of "monetary liability" that operates retroactively. *See* 511 U.S. at 284-85; *see also id.* at 270 (citing *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (refusing to apply statute reducing commissions available to customs collectors in actions commenced before its enactment)). Nor does the circumstance that the change decreases rather than entirely eliminates the possibility of a damages remedy remove the retroactive effect. The Court noted that "[t]he *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Landgraf*, 511 U.S. at 283-84.

Plaintiffs' rights are additionally impaired by the PLRA's limitations on the amount of attorney's fees that can be recovered

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[16] *See Blissett v. Casey*, 147 F.3d 218, 221 (2d Cir. 1998) (application of § 803(d) "would retroactively impair the plaintiff's right to full compensation for the violation of his constitutional rights by taking up to 25 percent of his damage award to cover the defendants' liability for plaintiff's legal fee under § 1988"), *petition for cert. filed*, 67 U.S.L.W. 3259 (U.S. Sept. 23, 1998) (No. 98-527).

under 42 U.S.C. § 1988.[17] In their complaints, prisoner plaintiffs routinely seek reasonable attorney's fees as one of their requests for relief. Prior to the PLRA's enactment, these plaintiffs anticipated that, if they succeeded, the liability they would otherwise incur to retain and pay for legal representation could be shifted to defendants pursuant to § 1988. Accordingly, a prisoner plaintiff could contract with an attorney to be represented at the attorney's market rate based on the understanding that if successful, plaintiff's counsel would in fact be paid by defendants. Application of § 803(d) to pending cases operates retroactively on the completed transaction of retaining an attorney.[18] If § 803(d) were applied to pending cases, then a successful plaintiff would become responsible for the shortfall created by the PLRA's caps on the amount of fees that defendants must pay under § 1988.[19] Congress can prospectively raise or lower the rates of compensation available in civil rights cases pursuant to § 1988, but imposing this change in cases in which an attorney-client relationship has already been formed

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[17] In addition to diminishing a successful prisoner plaintiff's right to monetary damages, § 803(d)(2) provides that in such cases, "[i]f the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U.S.C.A. § 1997e(d)(2). Using virtually identical mandatory language, § 803(d)(3) provides that: "No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel." *Id.* § 1997e(d)(3).

[18] *See Glover v. Johnson*, 138 F.3d 229, 250 (6th Cir. 1998) ("parameters of the attorney-fee statute in effect at the time legal services are requested clearly affects the relationship between the prisoners and their attorneys, including whether an attorney chooses to provide legal assistance in the first place").

[19] Although prisoners are often represented by *pro bono* counsel, such as the ACLU, § 803(d) presents a retroactivity problem because in other cases prisoners retain paid counsel.

would have a retroactive effect. That this effect occurs in connection with an attorney's fees provision and that the Court has not previously held that this kind of provision has a retroactive effect presents no barrier to doing so here. *See Hughes Aircraft Co.*, 117 S. Ct. at 1876 (noting that *Landgraf* "does not purport to define the outer limit of impermissible retroactivity," but to describe what "constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity").

Petitioners and their Amici argue that because § 803(d) involves attorney's fees, this case is an exception to the general *Landgraf* rule. *See* Petitioners' Br. at 24-29; Amici's Br. at 11-14. It is true that, in *Landgraf*, the Court asserted that the nature of attorney's fees determinations lent support to the decision in *Bradley* to apply a new fees statute in a pending case, and implied that statutes affecting attorney's fees are procedural. *See* 511 U.S. at 276-79; *see also id.* at 292 (Scalia, J., concurring) (asserting that majority "classifies attorney's fees provisions as procedural" and disagreeing with that classification). Categorizing the PLRA fees provision as procedural, however, does not automatically result in a determination that it can be applied in pending cases. While noting "the diminished reliance interests in matters of procedure," *id.* at 275 (citing *Ex parte Collett*, 337 U.S. 55, 71 (1949)), the Court also admonished that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.* at 275 n.29; *see also Glover*, 138 F.3d at 251 ("laws regulating litigation conduct often impact the substantive rights of the parties as well").

Amici's argument that § 803(d) should apply to pending cases because it does not regulate primary conduct similarly overstates its premise. *See* Amici's Br. at 12-14. The Court has explained that the actions of the parties giving rise to the legal proceeding constitute primary conduct, and that the actions of the parties in the course of the litigation constitute secondary

conduct. *See Hughes*, 117 S. Ct. at 1878; *see also Lindh*, 117 S. Ct. at 2070 (Rehnquist, C.J., dissenting) (same in criminal context). From a defendant's perspective, the actions that preceded service of a summons and complaint would be primary conduct. From a plaintiff's perspective, however, the decision to file a lawsuit is arguably primary conduct. The decision to file, as opposed to subsequent conduct in the litigation, is an inextricable part of the plaintiff's response to the offending behavior by the defendant.[20] In the same way that a defendant weighs the risks and benefits of certain behavior in light of current law, a plaintiff weighs the risks and benefits of filing a lawsuit.[21] At a minimum, the distinction between primary and secondary conduct is less helpful in assessing a plaintiff's reliance interests than those of a defendant. Accordingly, labeling § 803(d) as a "procedural" statute or one directed towards "secondary" conduct does not change the fact that it has an impermissible retroactive effect when applied to pending cases.

Application of the fees provision to work that a plaintiff authorized and the plaintiff's lawyer actually performed prior to the PLRA's enactment has an especially pronounced retroactive effect. In this circumstance, a plaintiff would have no notice that work done by his or her counsel would reduce a potential

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[20] *Cf. Landgraf*, 511 U.S. at 275 n.29 ("new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime").

[21] One example of the way in which the PLRA's reduction in a prisoner plaintiff's damages award could change this conduct is that a plaintiff may choose to file a lawsuit *pro se* rather than give up 25% of a potential damages award. Another example is that the attorney's fees restrictions could make it harder for a putative plaintiff to hire a lawyer, resulting in a decision not to file a lawsuit. *Cf. Bradley*, 416 U.S. at 721 ("no indication that the obligation under [the attorney's fees provision at issue], if known . . . would have caused the [defendant] to order its conduct so as to render this litigation unnecessary").

monetary judgment by up to 25%. Likewise, a plaintiff would have no notice that this work would create an additional obligation to compensate counsel for the reduced fees that would be awarded from defendants under § 1988. After the PLRA's enactment, once a plaintiff became aware of the changed legal import of authorizing these services, it would be too late to rescind that authorization. Applying § 803(d) to services performed prior to the effective date of the Act would present a paradigmatic case of imposing "new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270.

Moreover, there is no support in the text of § 803(d) for distinguishing between services performed before and after enactment. To the contrary, a comparison of the statutory text of § 803(d)(2) and § 803(d)(3) indicates that determining the precise moment that an attorney performed services for a prisoner plaintiff is not significant. *See* 42 U.S.C.A. §§ 1997e(d)(2), 1997e(d)(3). For the reasons given above, Congress must have known that § 803(d)(2), based on its retroactive effect on a plaintiff's monetary judgment, would apply only prospectively absent an express mandate to apply it to pending cases. Knowing that, Congress' failure to differentiate between the applicability of § 803(d)(2) (monetary judgment) and of § 803(d)(3) (hourly rate), and its use of the same "shall be applied" and "shall be based" language indicates that Congress intended both subsections to apply only to cases filed after the PLRA's enactment. *See id.*

III. APPLICATION OF THE PLRA ATTORNEY'S FEES PROVISION TO CASES FILED BEFORE THE ACT'S EFFECTIVE DATE WOULD BE MANIFESTLY UNJUST

In contrast to retroactive application of the fees provision in *Bradley* which the Court held did "not impose an additional or unforeseeable obligation" on the defendant, 416 U.S. at 721, or

cause "manifest injustice," 416 U.S. at 716-17, the application of § 803(d) in pending cases would be manifestly unjust to a prisoner plaintiff for all of the same reasons that it would have a retroactive effect. *See* Part II, *infra*. Such application would additionally be manifestly unjust to the attorneys who represent prisoner plaintiffs. In such cases, counsel reasonably relied on the availability of attorney's fees under 42 U.S.C. § 1988 when deciding to pursue litigation for a prisoner plaintiff. They had a settled expectation that if they prevailed, they would be compensated under § 1988 at the prevailing rate for attorneys with similar experience and skill.[22] Although counsel have no guarantee of winning when they first file a prisoner's civil rights complaint, the decision to file involves an assessment of the likelihood of success and the potential benefit to be gained for the plaintiff, as well as the plaintiff's attorney. As a practical matter, lawyers weigh the risks of losing against the potential benefits that will be realized if they win. Before the PLRA's enactment, one of those potential benefits was compensation for their services at market rates. Regardless of whether a plaintiff's lawyer has decided to litigate a case based on the potential to make money or to effect social change, the decision to file invariably entails an economic component. Section 803(d) represents a significant change to this component, and applying § 803(d) to pending cases would be manifestly unjust to attorneys who decided to represent a prisoner plaintiff based on

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[22] The very purpose of § 1988 was to create this expectation. The House report that accompanied the passage of § 1988 stated that the purpose of the legislation was to ensure "effective access to the judicial process" for victims of civil rights abuse. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). Similarly, the Senate report recognized that "fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation," S. Rep. No. 1011, 94th Cong., 2d Sess. 3-4 (1976), and stated that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 4 (citation and internal quotation marks omitted).

their assessment of the case under the governing legal rules at the time of their decision.[23]

The decisive moments for purposes of a "manifest injustice" analysis are the formation of an attorney-client relationship and the filing of a complaint. It is at these moments when an attorney assumes the legal responsibility to represent the plaintiff and becomes counsel of record for the plaintiff in the court in which the complaint is filed. Although application of the PLRA's attorney's fees provision may have serious financial implications for plaintiff's counsel, they cannot simply walk away from a case. Counsel who wish to withdraw from a case must get permission to do so from a court:

> An attorney who has entered an appearance in a case may not withdraw without leave of court because the court's interest in making sure that a litigant is adequately represented and that the

[23] *See Blissett*, 147 F.3d at 221 (applying § 803 "to representation begun before its passage could have a seriously detrimental retroactive effect on [attorneys'] previously established rights and reasonable prior expectations"); *Hadix*, 143 F.3d at 252 (applying § 803 to work performed in pending cases "both prior to and after" the PLRA's enactment results in impermissible retroactive effect on attorneys); *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996) (retroactive application of § 803 would impose new legal consequences to "services rendered by the plaintiffs' counsel in advance of the passage of the new Act"); *Jensen v. Clarke*, 94 F.3d 1191, 1202-03 (8th Cir. 1996) (applying § 803 would disappoint plaintiffs' attorneys' "reasonable reliance on prior law" and be "manifestly unjust"); *see also Inmates of D.C. Jail v. Jackson*, 158 F.3d 1357, 1363-64 (D.C. Cir. 1998) (Wald, J., dissenting) (applying § 803 to post-enactment legal services in case filed pre-enactment has impermissible retroactive effect on parties and lawyers), *petition for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 3, 1998) (No. 98-917); *Alexander S. v. Boyd*, 113 F.3d 1373, 1395 (4th Cir. 1997) (Murnaghan, J., dissenting) (applying § 803 retroactively would result in "manifest injustice" to plaintiffs' attorneys), *cert. denied*, 118 S. Ct. 880 (1998).

> orderly prosecution of the lawsuit is not disrupted is paramount to a lawyer's personal interest in terminating a relationship with a client.

Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 316 (1989) (Stevens, J., dissenting) (citing *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676 (3d Cir. 1986), and *Mekdeci ex rel. Mekdeci v. Merrell Nat'l Labs., Inc.*, 711 F.2d 1510, 1521-22 (11th Cir. 1983)); *see also Inmates of D.C. Jail*, 158 F.3d at 1363 (Wald, J., dissenting) (citing D.C. Rule of Prof. Conduct 1.16(b), "preclud[ing] lawyers from withdrawing from a case in midstream except under extraordinary circumstances").[24] As a practical matter, a court is unlikely to grant leave to withdraw unless substitute counsel is available,[25] and this will rarely be the case where a plaintiff's counsel is seeking to withdraw because the application of § 803(d) is causing a financial hardship. It is similarly unlikely that substitute counsel could be found to take on a prisoner class action lawsuit after the case has already been filed and is partially litigated. Thus, the exact stage at which a case is pending is less relevant

[24] *See also* American Bar Association Model Rules of Professional Conduct Rule 1.16(b) (describing circumstances that must be met for withdrawal); *accord* Ala. Rules of Professional Conduct Rule 1.16(b); Ark. Rules of Court Model Rules of Professional Conduct Rule 1.16(b); Cal. Attorneys and State Bar Code, Rules of Professional Conduct of the State Bar of California Rule 3-700(c); Colo. Court Rules, Colo. Rules of Professional Conduct (appendix to chapters 18-20) Rule 1.16(b); Ind. Code Ann. (appendix to Court Rules (Civil)) Rules of Professional Conduct Rule 1.16(b); New Hamp. Rev. Stat. Ann., Rules of Professional Conduct Rule 1.16(b); S.C. Code Ann., Appellate Court Rule 407, Rules of Professional Conduct Rule 1.16(b).

[25] *See Jolly v. Coughlin*, No. 92 CIV. 9026, 1999 WL 20895, at *10 (S.D.N.Y. Jan. 19, 1999) (rejecting defendants' argument that law firm could have withdrawn from representation because of PLRA fees provision and therefore refusing to apply PLRA retroactively to limit fees).

than whether the case was filed before or after enactment. Simply knowing the PLRA's effective date does not permit counsel for a prisoner plaintiff in a pending case to stop representing their client after that date.[26] Accordingly, "conduct occurring temporally after the law is in effect but which is an inextricable part of a course of conduct initiated prior to the law," *Inmates of D.C. Jail*, 158 F.3d at 1362 (Wald, J., dissenting), should be treated the same as pre-enactment conduct.

Application of the fees provision would be particularly unfair to plaintiff's counsel with respect to fees earned prior to the PLRA's enactment. In such cases, counsel has performed services at a time and under a legal regime in which they were eligible for payment at market rates under 42 U.S.C. § 1988. In some cases, that work was completed years before even the

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[26] Consider, for example, a case in which counsel filed suit on behalf of a class of mentally ill prisoners, knowing that it would be necessary to hire an expert psychiatrist to testify about the defendants' lack of an adequate mental health care system in order to prevail. *Cf. Boring v. Kozakiewicz*, 833 F.2d 468, 473-74 (3d Cir. 1987) (holding that expert testimony was necessary to show seriousness of medical need where it would not otherwise be "apparent to the lay person"). Counsel know that the plaintiff class has no money to pay for an expert and that fees for expert services in civil rights cases cannot be shifted from prevailing plaintiffs to defendants pursuant to § 1988. *See West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 102 (1991). Nevertheless, counsel decide that they will pay for an expert based on their expectation that, assuming they prevail on behalf of plaintiffs, they will be compensated for their services pursuant to § 1988 and that they can absorb this cost. Retroactive application of the PLRA fees provision would change the financial aspect of this calculus. Counsel would find themselves in a situation in which continued representation of the plaintiff class at an unanticipated below-market attorney's fees rate would cause a significant financial burden. However, counsel could not ethically change their earlier merits-based decision that hiring an expert was necessary, and for the reasons stated above, are unlikely to be able to withdraw from the case.

predecessor of the PLRA was introduced in Congress. To reach back to change compensation rules after the work has been done is contrary to the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . . ." *Landgraf*, 511 U.S. at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)). Retroactive application to pre-enactment services would also raise serious concerns that plaintiff's counsel lacked fair notice of the PLRA's fee restrictions. Although some counsel may have been aware of the PLRA as it was pending in Congress, as part of an appropriations bill, the absence of clear congressional intent defeats the notion that somehow counsel should have known that their pre-enactment work was subject to § 803(d). Such application would additionally overturn counsel's reasonable reliance and settled expectations that, if the plaintiff prevailed, their reasonable attorney's fees could be shifted to the defendants for payment at market rates under § 1988.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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